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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

THE MID-SOUTH GRIZZLIES
(A Joint Venture); et al.,
*Petitioners**

v.

THE NATIONAL FOOTBALL LEAGUE,
An Unincorporated Association; et al.,
*Respondents**

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioners are:

The Mid-South Grizzlies (A Joint Venture); John Edward Bosacco; Mid-South Grizzlies (A Limited Partnership); and Consolidated Industries, Inc.

Respondents are:

The National Football League, An Unincorporated Association; Baltimore Football Club, Inc.; Buffalo Bills, Inc.; Chargers Football Company; Chicago Bears Football Club, Inc.; Cincinnati Bengals, Inc.; Cleveland Browns, Inc.; Dallas Cowboys Football Club, Inc.; Detroit Lions, Inc.; Five Smiths, Inc.; Green Bay Packers, Inc.; Houston Oilers, Inc.; Kansas City Chiefs Football Club, Inc.; Los Angeles Rams Football Company; Miami Dolphins, Ltd.; Minnesota Vikings Football Club, Inc.; New England Patriots Football Club, Inc.; New York Football Giants, Inc.; New York Jets Football Club, inc.; New Orleans Saints Louisiana Partnership; Oakland Raiders, Ltd.; Philadelphia Eagles Football Club, Inc.; Pittsburgh Steelers Sports, Inc.; Pro-Football, Inc.; Rocky Mountain Empire Sports, Inc.; San Francisco Forty Niners; Seattle Professional Football, A General Partnership; St. Louis Football Cardinals Company; Tampa Bay Area NFL Football, Inc.; and Pete Rozelle.

QUESTIONS PRESENTED FOR REVIEW

1. Where the owners of the teams in the NFL controlled and monopolized the only market for professional football in the United States, did they have an obligation under the Sherman Act, Sections I and/or II, to use fair objective and reasonable criteria in determining to exclude from play in the NFL a fully qualified professional football team?

2. Were the owners of teams in the NFL, who monopolized the professional football market in the United States, permitted by the Sherman Act to exclude a qualified owner of a new professional football team, if the exclusion was intended to maintain their monopoly and/or reserve a geographic-submarket for their exclusive future use?

3. Should this Court grant certiorari where there is a direct conflict between the Third and Ninth Circuits with regard to the important antitrust issues of (1) whether the owners of National Football League teams violate the Sherman Act by their agreements to control the place where teams are to be located and (2) of whether they are economic competitors *inter se*?

4. If for the purpose of restraining trade in the market for football players' and coaches' services, the owners of NFL teams excluded an owner of a new, fully qualified professional team from play in the NFL, and the exclusion caused the ruin of the excluded owner's business, does the excluded owner have a cause of action under the Sherman Act, Section 1 and/or 2?

5. Where the owners of professional football teams in the NFL, by written rules and other agreements, arrogate to their arbitrary, subjective discretion the power to exclude from play in the NFL any applicant thereto, however qualified, are the rules and other agreements unreasonable on their face and illegal under the Sherman Act, Section 1 and/or 2?

6. Despite relevant outstanding discovery demands, and given petitioners' reliance on the district court's confirmation that it would consider only one limited issue, did the court's grant, without oral argument, of summary judgment against petitioners based on other issues so far depart from the accepted and usual course of judicial proceedings as to call for the exercise of this courts supervisory power?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners above named pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in this action 4 November 1983, rehearing and rehearing *en banc* denied on 5 December 1983.

OPINIONS BELOW

The orders of the Third Circuit dated 23 December 1983, 9 January 1984, and 13 February 1984, staying the issuance of its mandate, are reprinted at PA 71, 73, 78.[1]

* Petitioners and Respondents are enumerated on the inside front cover.

1. References to the Appendix to the Petition for Writ of Certiorari are designated "PA—".

The order of the Third Circuit denying rehearing and rehearing *en banc* on 5 December 1983 is reproduced at PA 69.

The judgment of the Third Circuit entered on 4 November 1983, affirming the judgment of the District Court entered on 5 November 1982, is reprinted at PA 83.

The opinion of the panel of the Third Circuit, dated 4 November 1983, is reported. *Mid-South Grizzlies, et al. v. National Football League, et al.*, 720 F.2d 772 (3rd Cir. 1983) (per Gibbons, J.), reprinted at PA 1.

The order of United States District Court for the Eastern District of Pennsylvania, McGlynn, J., entered 5 November 1982, granting respondents' (defendants therein) motion for summary judgment is reprinted at PA 32.

The opinion of the District Court, dated 5 November 1982, is reported. *Mid-South Grizzlies, et al. v. National Football League, et al.*, 550 F.Supp. 558 (E.D. Pa. 1982) (per McGlynn, J.), reprinted at PA 33.

JURISDICTION

The judgment of the Third Circuit affirming the district court's grant of summary judgment to respondents (defendants below) was entered on 4 November 1983. A timely filed petition for rehearing *en banc* was denied on 5 December 1983, and the 90 days in which to file this petition for writ of certiorari ended on Sunday, 4 March 1984. This petition, filed on or before Monday, 5 March 1984, was timely filed. Sup. Ct. R. 29.1.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND RULE INVOLVED

The Clayton Act, §4 (15 U.S.C. §15), *reprinted at* PA 84.

The Sherman Act, §§1&2 (15 U.S.C. §§1&2), *reprinted at* PA 84.

Act of 30 September 1961, Pub. L. 87-331, §§1-5, 75 Stat. 732, *codified at* 15 U.S.C. §§1291-1295 (exemption from antitrust laws of agreements covering "sponsored telecasting" of professional sports contests), *reprinted at* PA 85.

Act of 8 Nov. 1966, Pub. L. 89-800, §6(b)(1-3), 80 Stat. 1515, *codified at* 15 U.S.C. §§1291-1293 (exemption from antitrust laws of agreement combining operations of professional football leagues into one league), *reprinted at* PA 85.

Fed. R. Civ. P. 56(b), (c), (f) (summary judgment for defending party), *reprinted at* PA 88.

STATEMENT OF THE CASE

Petitioners originally brought this action in the United States District Court for the Eastern District of Pennsylvania to secure treble damages authorized by the Clayton Act, §4 (15 U.S.C. §15) for respondents' violations of the Sherman Act, §§1&2 (15 U.S.C. §§1&2). The district court had jurisdiction under 28 U.S.C. §1337. The district court granted respondents' second ("renewed") motion for summary judgment on 5 November 1982. Petitioners timely took an appeal to the United States Court of Appeals for the Third Circuit. The Third Circuit had jurisdiction under 28 U.S.C. §1291. A unanimous panel of the Third Circuit issued an opinion and entered judgment affirming the district court. The Third Circuit thereafter denied a timely filed petition for rehearing *en banc*.

In late 1975, petitioners owned a professional football team which had played in the World Football League ("WFL"). In October 1975, the WFL had ceased operations as a league. Intending to exploit their asset by entering the National Football League ("NFL"), petitioners contributed an additional $450,000 of further venture capital and maintained their team in fully operational status. They kept a full squad of professional football players under contract, as well as full coaching and management staffs. They also had a stadium lease and a commitment from a consortium of banks in Memphis for $10 million in financing. They solicited and received $10 deposits on season tickets from more than 40,000 fans in the greater Memphis area.

Petitioners then sought, but were refused, admission to the NFL. The NFL was an unincorporated association of 28 separate owners of professional football teams. With the demise of the WFL, petitioners owned, in 1975-1976, the 29th, and only other, professional football team in the United States. Respondents, the members of the NFL, held an absolute monopoly of the U.S. market for professional football.

Respondents' Constitution and By-Laws prescribed the criteria for membership: "any" person or group of "good repute" which "operated for profit" was eligible for membership. NFL Constitution and By-Laws, Article III, §3.2 (1974) ("By-Laws"). Petitioners qualified for membership. 720 F.2d at 786. The By-Laws also prescribed that in expanding the NFL, the nonmember owner of the proposed new team initiated the process when he filed a written application, in which, *inter alia*, he was to "designate the city" which would be the new member's home territory. *Id.*, §3.3(A). The By-Laws required that respondent Rozelle conduct such investigation of the applicant as he deemed necessary, and required that he then "submit the application to the members for approval". *Id.* §3.3(B).

Respondents admitted that they consistently ignored the By-Laws' requirements when new memberships were at issue, and instead added new teams only when and where it suited them. Rooney Depo., v. 1 at 43-47; Rozelle Depo. at 75-76, 102-103. Moreover, respondents ignored applications. The threshold determination of expansion *vel non* was the product of respondents' own "feeling" and respondents "subjective" concerns. Rozelle Depo. at 42, 74-76, 102.

Respondents admitted that there was neither investigation nor substantive consideration of petitioners application. Schramm Depo. at 161 (doubts that he even reviewed the application in any great detail); Phipps Depo. at 140 (unaware of any investigation into merits of application); Rooney Depo., v. 2 at 136 (no one conducted an extensive study of application). Respondents simply agreed to impose a moratorium on new entry to the market (Rooney Depo., v. 2, at 229, 235; Schramm Depo. at 176; Spadia Depo. at 52, 79; Phipps Depo. at 131), thereby keeping more money to themselves by excluding a new producer. Rozelle admitted that, short of a "court order", there was no incentive which petitioners could have offered, no price which petitioners could

have paid, no term or condition of entry to which petitioners could have consented, which would have gained petitioners' entry to the NFL.[2]

Petitioners, excluded from the NFL, were forced to liquidate their business.

In December 1979, petitioners timely filed the instant action for treble damages under the Clayton Act, §4 (15 U.S.C. §15). Petitioners claimed that respondents' refusal to admit them to the NFL was both a group boycott and an otherwise unreasonable restraint of trade under the Sherman Act, §1 (*id.*, §1). Petitioners further claimed that the refusal was an unlawful attempt to maintain, or an unlawful act to protect respondents' monopoly, in violation of the Sherman Act, §2 (*id.*, §2). Complaint, PA 90.

Petitioners filed discovery which respondents refused. Petitioners filed a motion to compel. While the motion was still pending, respondents filed their first

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2 Rozelle testified:

Q. Is there anything that the Plaintiffs, Mr. Bassett, or anyone that was related to them could have done between November and the meeting in Coronado that you know of right now that would have changed the mind of the League, so to speak, about accepting Memphis as a team for 1976 or for 1977?

A. Because of the circumstances we are going through, we spent a great deal of time discussing other things. *The only thing I could think of is a court order.*

Q. Other than a court order, the answer would be no?

A. *I can't imagine any other way.*

. . .

Q. Would you agree that all references throughout your entire deposition to a vote against the Plaintiffs or against Bassett or against Memphis was, in reality, not a vote against the Plaintiffs, Mr. Bassett, the Grizzlies, but rather *just a vote by the League not to expand, not to consider further expansion at that time?*

A. *Yes.*

Rozelle Depo. at 506-507 (emphasis supplied).

motion for summary judgment, supported by 2 affidavits, addressing all issues cognizable under the Section 1 and 2 Sherman Act claims. When the district court heard oral argument on the summary judgment motion, petitioners' motion to compel was still undecided, and had been for eight months. They required that discovery in order adequately to take depositions and oppose summary judgment.

Because petitioners lacked discovery, the district court declined to consider respondents' motion for summary judgment; it also declined to rule on petitioners' motion to compel. Rather, the court determined to focus on a narrow, limited factual issue, *i.e.*, whether respondents had articulated any reasonable, objective standards governing the admission of new enterprises to the NFL, and had applied any such standards to petitioners' application. The court expressly confirmed that it intended to *accept as true* the allegations in the complaint concerning all material facts other than those related to "this discrete area" of whether "the NFL applied objective standards to the plaintiffs' application". PA 137. The court declined to rule on both petitioners' original motion to compel and petitioners' two subsequent motions to compel addressed to later written discovery requests. PA 137. Instead, the court deferred all discovery to a later time, except the limited discovery related to the discrete area of objective standards. The court restricted petitioners to 5 specified depositions, and expressly limited the scope of these to the discrete area of objective standards. PA 64-65, 136-137, 150.

The district court confirmed that it intended to restrict its attention to the "discrete area" of objective standards.[3]

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3. At the close of the limited discovery, petitioners requested a conference with the court at which they would demonstrate unquestionably the existence of disputed facts material to the objective standards issue. PA 148-149. The district court denied a conference and determined to allow respondents to move for summary

But respondents did not confine their second ("renewed") motion for summary judgment to the "discrete area" concerning "objective standards" to which the court had confined petitioners' discovery. Rather, respondents' second motion renewed the entire spectrum of issues and arguments implicated under rule of reason and monopolization analyses.

Without allowing oral argument, the district court granted respondents' second motion for summary judgment. 550 F.Supp. 558 (E.D. Pa. 1982), *reproduced at* PA 33. In a single sentence, the district court dismissed petitioners' three outstanding motions to compel as irrelevant. 550 F.Supp. at 565.

On appeal, a panel of the Third Circuit acknowledged the district court's restrictions of petitioners' discovery. Moreover, the circuit court noted that petitioners' 3 outstanding motions to compel discovery, upon which the district court had declined to act, sought discovery admittedly relevant to: (1) the " 'objective standards' issue"; (2) proof of respondents' "motive for exclusion" of petitioners; (3) proof concerning the "competition issue"; (4) proof of petitioners' "retaliation claim" under the Sherman Act, §2; (5) proof of petitioners' "allegation [of] conspiratorial, anti-competitive activities"; (6) proof which "would establish [the] element of competition between plaintiff [sic] and defendant [sic] for geographical market"; and (7) proof of "competition for the Memphis home team market". 720 F.2d at 780-783 n.5. Yet the circuit court affirmed summary judgment.

On the limited factual record thus before it, the circuit court held as a matter of law that respondents had categorically no obligation under the Sherman Act to ad-

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Note 3—*Continued*
judgment on the objective standards issue, stating that if they could show without dispute that they had applied objective standards in considering petitioners' application, then that very well might be "the end of the litigation ballgame." PA 150.

mit any applicant to play in the NFL. The court found that respondents had complete monopoly power in the market, and held that respondents enjoyed unfettered discretion to exercise arbitrary power over admissions to the market which they monopolized. The court held that Congress had conferred this monopoly power on respondents and had evinced its intent that competition between them for both broadcast revenue and geographic-submarkets be eliminated. 720 F.2d at 785. Thus, the court held, exclusion of an applicant, even though arbitrary and the product of anticompetitive intent, could have no contra-competitive effect and did not violate the Sherman Act, §2. 720 F.2d at 787.

As to petitioners' Section 1 claims, the circuit court found the necessary agreement and concerted action (720 F.2d at 786), and assumed *arguendo* that petitioners qualified for admission and that there existed disputed material facts concerning respondents' intent or motivation to exclude petitioners. But the court held that all of that was "immaterial". 720 F.2d at 786. The court held that because respondents agree to "share" the "most part" (720 F.2d at 786-787) of their revenue, they thus are not competitors for that money. The court accepted *arguendo* that there could be competition among respondents in some geographic-submarket for non-shared, locally derived revenue. But the panel held that petitioners had failed to show "the existence of competition among NFL members and a potential franchise at Memphis" for such non-shared revenue. 720 F.2d at 787.

Petitioners claimed *in the district court* and before the circuit court that respondents compete in a "raw materials market" for players' services, coaches, training and management staff, etc. *E.g.*, Complaint, ¶62(d), 63(b), PA 107-108. Petitioners claimed that a purpose animating respondents' exclusion of petitioners was to restrain trade in this raw materials market. The circuit court accepted *arguendo* both competition in this mar-

ket and an anticompetitive effect on the market, but could see no injury to petitioners' business or property "caused" by any reduction of competition in the raw materials market. Thus, the court held that here too respondents' exclusion of petitioners had produced no cognizable antitrust injury. 720 F.2d at 787.

REASONS TO GRANT THE WRIT

The Recent Opinion Of The Ninth Circuit In The Los Angeles Coliseum Case And The Instant Decision Of The Third Circuit Directly Conflict.

There is a direct conflict with the decisions of the Court of Appeals for the Ninth Circuit and the Court of Appeals for the Third Circuit with regard to the central antitrust issues in this case; whether respondents' agreements to control where teams are to be located restrains competition in violation of the Sherman Act, and whether the individual team owners are economic competitors *inter se*. The Ninth Circuit said "yes" in *Los Angeles Memorial Coliseum Comm'n. v. National Football League*, ____ F.2d ____, No. 82-5572, *et al.*, slip op. (9th Cir., filed 28 February 1984). In the instant case, the Third Circuit said "no".

It is well settled that one major function of the Supreme Court is to "preserve uniformity of decision among the intermediate courts of appeal." *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 453 (1959) [Frankfurter, J., dissenting]. *Accord: Magnum Import Co. v. LeSpoturno Coty*, 262 U.S. 159, 163 (1922).

The principles here at issue are general and affect all sports leagues. The Ninth Circuit decision accords generally with the Tenth Circuit on these principles in *Board of Regents of the Univ. of Oklahoma v. National Collegiate Athletic Ass'n.*, 707 F.2d 1147 (10th Cir.), *cert. granted*, ____ U.S. ____, 104 S.Ct. 272 (1983). Only the Third Circuit has decided these issues differently, and wrongly. Because the Ninth and Third Circuit

decisions are contemporaneous, this Court may wish to consolidate both for certiorari review.

Summary Judgment Principles Were Applied In An Antitrust Case Of First Impression In A Manner Conflicting With Decisions Of This Court. On An Expressly Limited Record And Despite Relevant Outstanding Discovery Demands, The Court Affirmed Summary Judgment, In Substantial Part For Failure To Adduce Evidence Beyond Discovery Limitations.

Relying on the district court's direction, petitioners completed discovery in the one "discrete area" allowed by the court. But respondents renewed their earlier motion for summary judgment and re-raised all the issues they had earlier raised. Without oral argument, the district court granted respondents' motion for summary judgment, not limiting itself to the single issue it had told petitioners it would consider. Instead, it considered every issue, deciding in particular that respondents were in fact not competitors and that therefore the Sherman Act had no office to fulfill.

Having denied oral argument and denied full discovery, the district court abused its summary judgment authority. The Third Circuit itself has held:

> But by acting on the motion for summary judgment without argument, and without reference to what might be developed in discovery, which was being diligently pursued, the court erred.

Costlow v. United States, 552 F.2d 560, 564 (3rd Cir. 1977). In the instant case, petitioners pursued discovery as far as the district court's limitation allowed. Petitioners obeyed the district court's direction, taking the court at its word. They limited not only their discovery against respondents but also their own affirmative evidence to the one discrete area which the court itself had identi-

fied. Mr. Justice Powell, dissenting, has touched upon the error of the district court here:

> The Court concedes that "the parties conducted [only] a limited amount of pretrial discovery" . . . leaving undeveloped facts critical to an informed decision of this case. I do not think today's decision on an incomplete record is consistent with proper judicial resolution of an issue of this complexity, novelty, and importance to the public.

Arizona v. Maricopa County Medical Society, 457 U.S. 332, 102 S.Ct. 2466, 2480 (1982).

If the district court had changed its mind and had determined to decide all issues presented by respondents' renewed motion, its only proper course was to continue the matter and to afford petitioners full discovery on all issues raised under the rule of reason analysis which it purported to apply.[4]

On appeal, the circuit court approved the district court's conduct, even while itself expressly contradicting the district court's holding that all of petitioners' outstanding discovery requests were irrelevant. The circuit court found that the outstanding discovery demands were relevant to proof regarding not only objective standards, but also respondents' motive for excluding petitioners, competition among respondents *inter se* and

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4. Even after full discovery, summary judgment for respondents would have been entirely improper given the issues concerning their motive and intent behind their exclusion of petitioners (*Poller v. Columbia Broadcasting Systems, Inc.*, 368 U.S. 464, 472-473, 82 S.Ct. 486, 491 (1962)), their "business justification" defense and "self-serving disclaimer" of any competition *inter se* (*Norfolk Monument Co., Inc. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 702-703, 89 S.Ct. 1391, 1392-1393 (1969)), and their "highly irregular and ad hoc" procedures (*Board of Education v. Pico*, 457 U.S. 853, 102 S.Ct. 2799, 2811-2812 (1982)) governing their exclusionary decision, which "plainly do[] not foreclose the possibility that [their] decision . . . rested decisively [in their subjective motivation]" (*ibid.*).

for the Memphis geographic-submarket, and respondents' conspiratorial anticompetitive activities. 720 F.2d at 780-783 n.5.

The court made no finding that petitioners in Memphis and other NFL teams would *not* compete, even though it was respondents' burden so to prove on their motion for summary judgment. Petitioners' outstanding requests for production demanded the season ticket holder mailing lists, correspondence between NFL members and fans, and opinion polls and market surveys of NFL teams in the region surrounding Memphis. *Ibid.* The court admitted that these requests "would tend to suggest the possibility of competition for the Memphis home team market". *Ibid.* Yet it affirmed the refusal of this discovery and in the next breath faulted petitioners for failing to prove the facts to which the discovery was addressed. 720 F.2d at 786-787.

Petitioners argue here that something is very wrong when summary judgment in a major antitrust case of first impression is granted and affirmed on the basis of merely 5 depositions limited in scope and the purported failure of the plaintiffs below to adduce proof beyond the limited scope authorized by the district court. The district court's practice here denied petitioners due process and so far departed from the accepted and usual course of judicial proceedings, and the circuit court so far sanctioned such departure, as to call for this Court's exercise of its supervisory power.

Petitioners, Buyers In The "Raw Materials Market", Were Victims Of An Admitted Conspiracy To Restrain Trade In The Market. The Court's Decision That Their Injury Was Not "Caused" By Respondents' Conspiratorial Anticompetitive Conduct Contradicts Recent, Controlling Authority From This Court.

The circuit court implicitly accepted that a relevant product-submarket is the "raw materials market" for players' and coaches' services, and implicitly accepted

arguendo both respondents' anticompetitive intent to restrain trade in that market and an anticompetitive effect on it from excluding petitioners. But the court stated that the exclusion of petitioners "in no way restrained [petitioners] from competing for players by forming a competitive league." 720 F.2d at 787. This finding directly conflicts with the court's own earlier admission that forming a rival league was not a reasonably available alternative. 720 F.2d at 785 n.7 & accompanying text ("no doubt" that NFL "presents a formidable barrier to entry by a competitive football league"). Faced with the "formidable barrier" to formation of a rival league which the NFL posed, petitioners were not required to form such a league. *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416 (1945); *Board of Regents of the Univ. of Oklahoma v. National Collegiate Athletic Ass'n.*, 546 F.Supp. 1276, 1288 (W.D. Okla. 1982), *aff'd in part and rev'd in part on other grounds*, 707 F.2d 1147 (10th Cir.), *cert. granted*, ____ U.S. ____, 104 S.Ct. 272 (1983); *Gamco Inc. v. Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952). The relevant restraint in this context is the restraint imposed upon the players by arbitrarily eliminating petitioners, who would otherwise have been an additional buyer of their services. Unless the court could hold on the record that a rival league was a reasonable, practicable alternative, it could not dismiss from consideration the anticompetitive effect on players and coaches of excluding petitioners from the NFL.

The court seemed to consider any effect on the raw materials market irrelevant, because petitioners

> fail[ed] to explain how, if their exclusion from the league reduced competition for team personnel, that reduction caused an injury to [their] business or property.

720 F.2d at 787 (citation omitted).

The injury to petitioners was the forced liquidation of their business and the loss of expected profits. In the circumstances prevailing after October 1975, petitioners, who owned a professional football team and wanted to exploit and market their asset, had no reasonable alternative to membership in the NFL. Their exclusion from the NFL directly caused the failure of their business. They alleged in their complaint (PA 107-108) and the circuit court seemed to accept *arguendo*, that their exclusion was a means by which respondents restrained trade in the raw materials market, to respondents' advantage. From this, the court should have held that petitioners' injury was directly caused by respondents' conspiratorial anticompetitive conduct, and that petitioners had asserted a valid antitrust action. *Cromar Co. v. Nuclear Materials & Equipment Corp.*, 543 F.2d 501, 505-510 (3rd Cir. 1976) ("producer-participant" in industry whose elimination was instrumental in co-producer's acquisition of monopoly power had standing to sue).

In *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 102 S.Ct. 2540 (1982), this Court held that Section 4 of the Clayton Act

> does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers . . . . The Act is comprehensive in its terms and coverage, protecting *all who are made victims of the forbidden practices* by whomever they may be perpetrated.

457 U.S. at —, 102 S.Ct. at 2545 (emphasis supplied; quotation and citation omitted). This Court further held that an insured who had been denied reimbursement for specified medical services had standing to sue the insurer for its participation in an anticompetitive conspiracy aimed not at the insured but at the medical care providers, because the denial of reimbursement "was the very means by which" the insurer allegedly "sought to achieve its illegal ends". 457 U.S. at —, 102 S.Ct. at

2549. The injury was the non-reimbursed cost of the services. The Court held:

> The harm to McCready . . . was clearly foreseeable; indeed it was a necessary step in effecting the ends of the illegal conspiracy. Where the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely "the type of loss that the claimed violations . . . would be likely to cause."

Ibid. (citation omitted).

McCready was not an economic actor in the market which the insurer had conspired to restrain. Yet she had standing to sue for injury to her property because infliction of that injury was the very means to the anticompetitive end. Here, petitioners were a producer-participant in the professional football market and a buyer in the raw materials market for playing and coaching talent. The elimination of petitioners as a buyer in the market was not only the means by which trade in the market was sought to be restrained, it was in and of itself the actual restraint. Petitioners were not merely made the victims of forbidden practices, but the victimization was itself the forbidden practice. Causation, then, is established. By holding the contrary, the circuit court decided this question in direct conflict with *Cromar* from its own circuit, and with *McCready* from this Court.

The Court Adopted A Construction Of The Sherman Act In Conflict With Congress' Intent And This Court's Decisions When It Held That Respondents, Separate Horizontal Producers, Are Not Competitors Because They Agree To "Share" Market Revenue. Unable To See Competition, It Held That Arbitrary Exclusion Of Petitioners Presented "No Injury to Competition".

On appeal, the circuit court accepted as undisputed respondents' claims that they "share" revenue, and,

echoing the district court, opined that petitioners "sought to participate" in the "revenue sharing arrangement" (720 F.2d at 776). The court then held that respondents are not competitors *inter se* with respect to their shared revenue activities. Rather, "the congressionally authorized arrangements under which the NFL functions eliminate competition among the league members." 720 F.2d at 786. The court, in effect, held that because respondents agree to share certain revenue, they are not competitors for the cartel pie, and since petitioners wanted a share of the pie, petitioners did not want to compete but to join as a noncompeting cartel member. Blinded by the "absence of any appearance of competition" (*Cromar Co. v. Nuclear Materials & Equipment Corp.*, 543 F.2d 501, 511 (3rd Cir., 1976)), the court could see no office for the antitrust laws to perform. In particular, the court could not see that using the Sherman Act to force the monopolists to share their market with a new market entrant is, by definition, to force the market to be opened up to competition.

Respondents are independent business entities unrelated in any way except by membership in a common trade association, the NFL. 720 F.2d at 775 (each member of association an "entity" organized for profit), 782 n.5 (accepting as fact compliance with prohibition of financial interest by one entity in any other). Having structured themselves as separate business entities "organized for profit" (*id.* at 775), they are fully subject to the Sherman Act, §1. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 141-142, 88 S.Ct. 1981, 1986 (1968); *Kiefer-Stewart Co. v. Joseph E. Segram & Sons*, 340 U.S. 211, 215, 71 S.Ct. 259, 261 (1951); *North American Soccer League v. National Football League*, 670 F.2d 1249, 1256-1258 (2d Cir., 1982), *cert. denied*, —— U.S. ——, 103 S.Ct. 499. Thus, agreements between respondents concerning trade are fully subject to antitrust scrutiny, whether respondents are

competitors *inter se* or not,[5] and whether or not they have agreed to share all or some portion of the revenue to be made in the market.

Respondents are in fact competitors, albeit competitors who have (for the present) agreed to divvy-up the proceeds from one marketable commodity, broadcast rights to "sponsored telecasting". Congress exempted from the antitrust laws the "joint agreement" by which respondents sell their broadcast rights to "sponsored telecasting". 15 U.S.C. §1291. Congress specifically did *not* exempt any agreements by which respondents choose to distribute the revenue gained on the sale. *Id.* §1294. Any scheme of distribution therefore must be reasonable under the Sherman Act, §1. By excluding petitioners from participating in the market, respondents schemed in effect to distribute the broadcast revenue pie only among themselves. Respondents thus conspired to hoard for themselves all of the money which can be earned from marketing major-league professional football teams. To the extent that the conspiracy succeeded, trade was obviously restrained. If respondents denied petitioners this market opportunity arbitrarily, without applying objective standards, the restraint was unreasonable under the Sherman Act, §1. *Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246 (1963); *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416 (1945).

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5. Even assuming *arguendo* that respondents were, in the NFL, "entities engaged in a joint venture" (*North American Soccer League, supra*, 670 F.2d at 1252), who thus would not be competitors *inter se* vis-a-vis the venture, nonetheless that would

> not exempt from the Sherman Act an agreement between its [NFL's] members to restrain competition. . . . The NFL members have combined to protect and restrain not only leagues but individual teams. The sound and more just procedure is to judge the legality of such restraints according to well-recognized standards of our antitrust laws rather than permit their exemption . . . .

Id., 670 F.2d at 1257.

Though an agreement jointly marketing respondents' broadcast rights to sponsored telecasting was exempted by Congress from antitrust purview, Congress neither required that such agreement be reached, nor that it last forever, nor that the television networks must necessarily subscribe to it. In 1976, when respondents passed their formal resolution excluding petitioners, their television contract extended only to 1978. There was no agreement in place with the networks for 1979 or thereafter, and despite respondents' desires not to compete *inter se* for sales to the networks, the networks were free to insist upon such competition. *See Board of Regents of the University of Oklahoma v. National Collegiate Athletic Ass'n.*, 707 F.2d 1147 (10th Cir.), *cert. granted*, —— U.S. ——, 104 S.Ct. 272 (1983).[6] By excluding petitioners, respondents limited the number of sellers in the market and eliminated the opportunity for some network, whether commercial ("sponsored"), pay or cable, to buy independently from an additional seller. Respondents patently restrained trade, and their exclusionary decision is manifestly subject to antitrust review.

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6. A joint agreement among respondents, by which the NFL as a league sells or transfers all or any part of respondents' broadcast rights in sponsored telecasting of their games, is expressly exempted from the antitrust laws. 15 U.S.C. §1291. The applicability of the antitrust laws to every other "act, contract, agreement, rule, course of conduct or other activity" of respondents (except the merger-agreement also listed in §1291) is unaffected by the exemption allowed in §1291. Id., §1294. Thus, only the agreement by which the league actually sells or transfers some or all of the broadcast rights of its members is protected by §1291.

An agreement by all of the members to refuse to sell anything other than a total, pooled package is therefore not protected. Rather, a network is free to negotiate a sale with one or a few of the league's members, ignoring the others. An agreement by a majority of league-members to coerce a minority to subscribe to the league's package-sale agreement on threat of expulsion is therefore not protected. Rather, only the sale agreement itself, between those members who subscribe to it, is protected. If the members may not expel an existing member who refused to subscribe to a joint agreement

In the market for live-television broadcasting of college football, structured indistinguishably from the market here, the Western District of Oklahoma readily dispatched as "incredible" the argument by the National Collegiate Athletic Association that its football-producing members were not competitors. *Board of Regents of the University of Oklahoma v. National Collegiate Athletic Ass'n.*, *supra*, 546 F.Supp. at 1306. The district court in *Board of Regents* expressly found that the NCAA's football-producing members were horizontal competitors *inter se* despite revenue sharing. 546 F.Supp. at 1304 (NCAA revenue sharing controls *held* "horizontal agreements among competing sellers to limit the availability of their products"). The 28 business entities associated in the NFL are no less competitors *inter se* in the major-league, professional football market. It makes no logical difference that plaintiffs in *Board of Regents* were already members threatened with expulsion, as contrasted with the instant petitioners who were nonmembers of the NFL excluded from admission.

On appeal in *Board of Regents*, a Tenth Circuit panel fully affirmed this analysis of the competitive nature of the product-market. It held that the challenged revenue-sharing arrangement was an agreement among horizontal competitors to restrict their market shares. It was

> not persuaded by the NCAA's contention that the plaintiffs are merely seeking a "bigger slice of the [cartel] pie" . . . . In *Perma Life Mufflers* . . ., similar arguments were made and rejected.

707 F.2d at 1151 (citations omitted).

Note 6—*Continued*

on the expectation that negotiating independently he could command a larger share of the broadcast revenues, then perforce they may not exclude a prospective member who seeks to gain some share, albeit equal, of the broadcast revenues.

Expressed in the words of the circuit court in *Board of Regents*, the NFL is an economic integration of horizontal market producers, "a combination of . . . all the producers, actual or potential, of a differentiated product — commercially salable [professional] football." 707 F.2d at 1156. The NFL, like the NCAA, "is essentially an integration of the rulemaking and rule-enforcing activities of its member[s] . . ." (*id.* at 1153). In 1966, the then extant AFL and NFL were competing market integrations, each indistinguishable in nature and function from the present NCAA. The present NFL is distinguishable only in so far as it is a super-integration of the two formerly competing integrations, born perhaps to congressional midwiving, but there the tender ministrations stopped.

Contrary to the view of the circuit court here, Congress granted no license to the suprastructure thus created to arbitrarily exclude future, actual or potential, producers from the market. Congress manifestly intended the contrary: to open up the industry, to compel these respondents to accomodate more teams in more cities than the NFL had theretofore allowed. To aid in achieving that result, Congress exempted the agreement to merge only on the express condition that the merged league "increase rather than decrease the number of professional football clubs so operating [in the merged league]". 15 U.S.C. §1291. *See* 1966 U.S. Code Cong. & Admin. News, at 4378.[7]

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7. The merger-exemption, narrowly drawn, applies by its terms solely to the two leagues' agreement "to combine in a single league". It does not apply to any other agreement. It did "not extend to the combined league any greater antitrust immunity" than the separate, competing leagues or their members individually had enjoyed; it did "not seek to resolve any of the antitrust problems of professional football" existing prior to the merger. Senate Rpt. No. 89-1654, 89th Cong. 2d Sess. (1966).

Representative Celler's remarks in debate on the NFL's merger-exemption (15 U.S.C. §1291 (amended 8 Nov. 1966)) are

The temperament of the circuit and district courts below should therefore have been ever the more stridently insistent that this particular, monopolized product be as widely marketed through as vigorous a competitive process as possible. But the circuit court's decision here conferred in practical effect precisely the

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NOTE 7— *Continued*

instructive. Opposed to the exemption, he expressed his concerns that the legislation

> immunizes the contents of a joint agreement. What is this joint agreement?
>
> . . . It contains all manner and kinds of operations under the league that would be formed, including the common draft, *the division of territory, an arbitrary method of doling out franchises*, and all manner and kinds of additional operations *which presently come within the four squares of the antitrust laws*. That is what we will be immunizing . . . . That is why I want to have some hearings. I did not want to buy a pig in a poke.

Congressional Record, no. 112, p. 28231 (20 Oct. 1966) (emphasis supplied). Proponents of the legislation offered assurances that no such modification of the antitrust laws was intended:

> [A]ntitrust will apply to them hereafter acting as a single league and it does not exempt anything that flows from the contract which [Mr. Celler] has referred to.

Id., at 28234; *see id.*, at 28233. And the legislation itself disclaimed any affect on the "applicability or nonapplicability of the antitrust laws" to any agreement (except one expressly identified) or "other activity" by the members of the combined league. 15 U.S.C. §1294.

In 1972, the Senate Committee on the Judiciary reported on a bill similarly exempting the proposed merger of two professional basketball leagues. The Committee found that the proposed legislation

> is in the public interest, but only if certain restrictions are placed upon the operating rules of the merged entity. *It is clear that merger should do more than simply create lucrative monopoly rights beyond the reach of the antitrust laws* . . . .

Senate Rpt. No. 92-1151, 92nd Cong. 2d Sess., at 5 (emphasis supplied). The report further stated that because of such a partial exemption, "*professional team sports enjoy a position of special trust which should not be used to deprive segments of the public from the monopolized product.*" *Id.*, at 6 (emphasis supplied).

immunity for respondents' "division of territory" and "arbitrary method of doling out franchises" (Congressional Record, no. 112, p. 28231 (20 Oct. 1966), *quoted in* note 7 *supra*) which Congress has consistently refused to confer in law. The court must be reversed.

The Court's Decision Stands In Conflict With The "Essential Facility Doctrine".

Had the circuit court applied, as did the Second Circuit and as Congress intended, the "well-recognized standards of our antitrust laws rather than permit their exemption" (*North American Soccer League*, *supra*, 670 F.2d at 1257), it would have held that the NFL is an essential, "bottleneck" facility. The court had "no doubt" that respondents' dominant market power, concentrated in the NFL, "presents a formidable barrier" to the formation of a rival league. 720 F.2d at 785 n.7. And in fact, in October 1975, the WFL, the only rival league since the AFL-NFL merger, collapsed, in part because of the NFL's unshakable lock on network television revenues. Bassett Depo. at 218-219. Petitioners, as ex-WFL members, were producer-participants in the market facing the "formidable barrier" recognized by the panel. Given those facts, and applying the well-established essential facilities doctrine, the panel should have held that respondent-monopolists had no discretion arbitrarily, without procompetitive justification, to refuse petitioners access to the facility on fair, reasonable and equal terms. *Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246 (1963); *United States v. International Boxing Club of N.Y.*, 348 U.S. 236, 75 S.Ct. 259 (1955); *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416 (1945); *United States v. Terminal R.R. Ass'n. of St. Louis*, 224 U.S. 383, 32 S.Ct. 507 (1912); *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952).

But instead, and citing no authority for the proposition, the court held that the "essential facilities doctrine

is predicated on the assumption that admission of the excluded applicant would result in additional competition . . . ". 720 F.2d at 787. Since the court could see no competition, it could see no benefit from petitioners' entry to the market. It therefore refused to apply the essential facilities doctrine. *Ibid.*

The analyses and holdings below are fatally flawed in every premise upon which they rest. The court adopted a construction of the Sherman Act entirely at odds with established authority from this Court and many other Circuit Courts. Even when it admitted anticompetitive intent and anticompetitive effect in the relevant raw materials product-market, the court denied that petitioners' injury was "caused" by respondents' anticompetitive activity in that market.

The circuit court granted in practical effect an immunity arbitrarily to exclude any qualified prospective market-entrant wanting to put a football team in a city not presently the geographic-submarket of an existing NFL member. The import of this decision is horrifying to consider. If respondents have immunity to exclude because they are not competitors, then they necessarily have immunity to *expel*. Under the circuit court's rationale, respondents could arbitrarily expel any existing member located in a geographic-submarket having no other NFL member in it, because there would be no competition to be injured thereby. Indeed, according to the court, such action would be "patently pro-competitive" because it would make one more city "available as a site for another league's franchise" and would leave the expelled member "as a potential competitor in such a league". 720 F.2d at 786.

In short, the court conferred upon respondents' arbitrary power to dole out franchises, to hoard the cartel pie entirely unto themselves, to take back franchises and to redistribute the cartel pie in fewer shares to fewer market participants. The court's decision so far conflicts with established antitrust tenets and so frustrates mani-

fest congressional intent as to require review on certiorari by this Court.

Respondents' By-Laws Consigned Membership Decisions To Their Subjective Discretion Unfettered By Objective Standards, And Were So Fraught With Anticompetitive Potential As To Be Facially Unreasonable.

Respondents' By-Laws prescribed the admission criteria and procedure for passing on applications like petitioners'. The only substantive criterion was that the applicant be of "good repute", an inherently subjective evaluation. The procedure expressly consigned the admission decision to the subjective discretion of the markets' existing producers, unfettered and unbounded by reasonable, objective decisional criteria. The procedure provided that the application could be approved only by affirmative vote of at least 21 of the 28 owners then in the NFL. By-Laws, Article III, §3.3(C). Thus, any 8 owners *combining in service to any motive* could foreclose entry by an applicant, however qualified.

The district court found that respondents exercised complete monopoly power in the relevant market. 550 F.Supp. at 577 & n.33. The circuit court had no doubt that respondents posed a formidable barrier to the formation of a competitor-league (720 F.2d at 785 n.7 and accompanying text), which the court held was relevant "to the extent that it bears on the obligation to permit entry" (*ibid*). Both courts should then have held, as petitioners argued, that in the presence of monopoly power, the inherently subjective decisional process was so frought with anticompetitive potential as to be "facially unreasonable", according as it undisputedly did, arbitrary "power to exclude". *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1383 (5th Cir. 1980) (footnote omitted).

In *Board of Regents*, the circuit court recognized that an

> association's rule or practice can in certain circumstances be considered facially unreasonable, *see Fashion Originators' Guild; Radiant Burners; Associated Press* . . . , and thus can be summarily invalidated as an illegal boycott.

707 F.2d at 1161 (citation omitted). But the court found that the expulsion sanction there at issue appeared to be an enforcement mechanism ancillary to an integration of the members' rulemaking functions, and thus "not a sham for anticompetitive purpose." *Ibid.*

Here, to the contrary, the admission decision at issue was expressly consigned to the subjective discretion of any 8 of the market's 28 producers, free to vote in service to any motive with neither guidance nor hindrance by objective, reasonable decisional criteria. Moreover, on the limited discovery which was allowed, it stands undisputed that these competitors voted their subjective, "pocketbook" concerns to impose an absolute moratorium on new market entry, because they did not wish to share the available revenue from television broadcast sales and did not wish to contend with the dilution of playing talent which they believed would accompany market expansion.

In such circumstances, the membership criteria and the written procedure for new membership determinations which here prevailed were facially unreasonable. *Realty Multi-List*, supra, 629 F.2d 1351. *See Silver v. New York Stock Exchange, supra*, 373 U.S. 341, 83 S.Ct. 1246; *Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc.*, 365 F.2d 478, 481-484 (5th Cir. 1966) (monopolists' exclusionary decision made under unreasonable standards drawn up *post hoc* and arbitrarily applied *held* contra Sherman Act, §2); *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc., supra*. 194 F.2d at 487-488 (association's exclusionary decision made absent objective, reasonable selection criteria *held prima facie* contra Sherman Act, §2). Summary judgment for respondents thus was unwarranted.

The Court Held That Exclusion Of Petitioners From The NFL Incurred No Section 2 Liability Even Assuming Monopoly Power And Intent To Maintain The Monopoly. The Court's Decision Defies Authority From This Court And Undermines The Effectiveness Of The Antitrust Laws.

In the instant case, on petitioners' claim that respondents abused their monopoly power by arbitrarily excluding petitioners without applying objective standards to the decision, the circuit court adopted its analysis of the Section 1 Sherman Act claim (720 F.2d at 788) and held that petitioners had "failed to show that their [exclusion was] contra-competitive in any way. Indeed the Memphis home team market has been left by the NFL for potential competitors" (*ibid.*). Thus the court echoed its Section 1 ruling that since there was no competition shown among respondents *inter se*, it could see no injury to competition from the exclusion of petitioners.

The court acknowledged petitioners' contention that they could prove anticompetitive intent behind the exclusionary decision, both an intent to retaliate against them as prior competitors and an intent to reserve a geographic submarket for the monopolists' future use. 720 F.2d at 786. The court assumed that the record "presents disputed fact issues with respect to the actual motivation of the NFL members . . . ." *Ibid.* Respondents adduced *no* evidence that petitioners had any practicable, reasonable alternative to membership in the NFL, and indeed the circuit court having found that respondents' association poses a formidable barrier to any alternative.

In these circumstances, the court should have held that respondents had no discretion arbitrarily to exclude petitioners. Respondents' lawful acquisition of monopoly power is immaterial. *United States v. Griffith*, 334 U.S. 100, 68 S.Ct. 941 (1948) (anticompetitive use of lawfully

acquired monopoly power *held* contra Sherman Act, §2). It is because of the possession of such power, however acquired, that "added obligations are imposed on the defendant which would not attach in the ordinary refusal to deal context." *Byars v. Bluff City News Co., Inc.*, 609 F.2d 843, 855 (6th Cir. 1980). Therefore, when a collective holds monopoly power by control of an essential facility, the "added obligations" are that entry to the facility be available on fair and equal terms, and that reasonable, objective criteria govern any power of exclusion. *Silver v. New York Stock Exchange, supra*, 373 U.S. 341, 83 S.Ct. 1246; *United States v. International Boxing Club of N.Y., supra*, 348 U.S. 236, 75 S.Ct. 259; *Associated Press v. United States, supra*, 326 U.S. 1, 65 S.Ct. 1416; *United States v. Terminal R.R. Ass'n of St. Louis, supra*, 224 U.S. 383, 32 S.Ct. 507.

> Once it is determined that the [membership] program is not an objective one, no further evaluation . . . is appropriate. . . . [C]ourts will decline to weigh and measure the harms and benefits . . . .

United States v. Realty Multi-List, Inc., supra, 629 F.2d at 1383, *quoting with approval* L. Sullivan, Antitrust 249 (1977).

In these circumstances, the court was plainly wrong when it held that respondents' anticompetitive exclusion of petitioners from play in the NFL was immaterial because "the action complained of produced no injury to competition" (720 F.2d at 786). The injury and the exclusion were one and the same. *Lorain Journal Co. v. United States*, 342 U.S. 143, 155, 72 S.Ct. 181, 187 (1951) (power of trader to select in "his own independent discretion . . . parties with whom he will deal" circumscribed and denied in presence of "purpose to . . . maintain a monopoly"); *United States v. Griffith, supra*, 334 U.S. 100, 68 S.Ct. 941.

The circuit court acknowledged petitioners' contention that they were excluded because respondents were

reserving the Memphis geographic-submarket for their own future use. 720 F.2d at 786. The record reveals that respondents themselves considered 30 teams to be a good size for the league, that their own research study identified numerous geographic locales, including Memphis, capable of supporting a new team, and that many cities and entrepreneurs not already in the NFL consistently applied for expansion franchises and were consistently ignored. There thus existed a supply of potential franchise sites and a demand for them. Because of respondents' strangle-hold on expansions and determination to impose a moratorium on new admissions, the expected competition for the potential franchise sites was stillborn. Indeed, by withholding Memphis for their own future use from petitioners who wanted it for immediate use, respondents themselves became competitors for the expansion site and suppressed trade among all market forces competing for the sites. *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc., supra*, 194 F.2d 484. *See also United States v. Associated Press*, 52 F.Supp. 362 U.S. 1, 65 S.Ct. 1416 (1945) (cooperative association gathering news); *American Federation of Tobacco Growers v. Neal*, 183 F.2d 869 (4th Cir. 1950) (association withholding place on auction list); *Blalock v. Ladies Professional Golf Ass'n.*, 359 F.Supp. 1260 (N.D. Ga. 1973) (limited number of positions available in sports tournament). As in *Gamco*, respondent-monopolists here abused their monopoly power by arbitrarily denying a qualified expansion site to a new market entrant.

By its holding here, the circuit court defied long established precedent from this Court. Where other decisions of Courts of Appeals threatened seriously to undermine the effectiveness of the antitrust laws as a bulwark of antitrust enforcement, this Court has not hesitated to grant certiorari. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139, 88 S.Ct. 1981, 1984-1985 (1968). The courts have no "power to under-

mine the antitrust acts by denying recovery to injured parties . . . ." *Ibid.* Nor should the circuit court here be allowed to undermine the Act.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the Court of Appeals for the Third Circuit so that this Court may resolve the direct conflict between the Ninth and Third Circuits, and correct the decision below.

Respectfully submitted,

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No. 83-1470

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

THE MID-SOUTH GRIZZLIES
(A Joint Venture); et al.,
*Petitioners**

v.

THE NATIONAL FOOTBALL LEAGUE,
An Unincorporated Association; et al.,
*Respondents**

PETITIONERS' SUPPLEMENTAL BRIEF UNDER S. CT. R. 22.6 ON PETITION FOR WRIT OF CERTIORARI

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* Petitioners are:

The Mid-South Grizzlies (A Joint Venture); John Edward Bosacco; Mid-South Grizzlies (A Limited Partnership); and Consolidated Industries, Inc.

Respondents are:

The National Football League, An Unincorporated Association; Baltimore Football Club, Inc.; Buffalo Bills, Inc.; Chargers Football Company; Chicago Bears Football Club, Inc.; Cincinnati Bengals, Inc.; Cleveland Browns, Inc.; Dallas Cowboys Football Club, Inc.; Detroit Lions, Inc.; Five Smiths, Inc.; Green Bay Packers, Inc.; Houston Oilers, Inc.; Kansas City Chiefs Football Club, Inc.; Los Angeles Rams Football Company; Miami Dolphins, Ltd.; Minnesota Vikings Football Club, Inc.; New England Patriots Football Club, Inc.; New York Football Giants, Inc.; New York Jets Football Club, Inc.; New Orleans Saints Louisiana Partnership; Oakland Raiders, Ltd.; Philadelphia Eagles Football Club, Inc.; Pittsburgh Steelers Sports, Inc.; Pro-Football, Inc.; Rocky Mountain Empire Sports, Inc.; San Francisco Forty Niners; Seattle Professional Football, A General Partnership; St. Louis Football Cardinals Company; Tampa Bay Area NFL Football, Inc.; and Pete Rozelle.

QUESTION PRESENTED FOR REVIEW

Will this Court grant certiorari to review the Third Circuit's Opinion, directly conflicting with the Ninth Circuit, that the antitrust laws are so constricted by such a narrow concept of "competition" as to immunize from judicial scrutiny even respondents' arbitrary exclusion of qualified new teams (or expulsion of existing teams)? In other words, does some necessity in the professional football industry for a unitary, self-governing structure place all "business judgments" to exclude (or expel) a team beyond the reach of antitrust criteria of reasonableness and minimal anticompetitive impact?

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IN THE
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PETITIONERS' SUPPLEMENTAL BRIEF UNDER S. CT. R. 22.6 ON PETITION FOR WRIT OF CERTIORARI

In accord with S. Ct. R. 22.6, petitioners submit this supplemental brief in support of their petition for writ of certiorari to the United States Court of Appeals for the Third Circuit.

Petitioners' instant petition for writ of certiorari was due to be filed in this Court on Monday, 5 March 1984. On the preceding Tuesday, a divided panel of the Court of Appeals for the Ninth Circuit filed its opinions in *Los Angeles Memorial Coliseum Commn., et al., v. National*

Football League, et al., ____ F.2d ___, Nos. 82-5572 *et al.*, slip op. (9th Cir., filed 28 Feb. 1984). Petitioners received a copy of the Ninth Circuit panel's opinions too late to allow any substantial analysis of them or their direct implications for the instant petition. Under the authority of S. Ct. R. 22.6, petitioners submit this supplemental brief addressed to those questions.

REASON TO GRANT THE WRIT

The Recent Decision Of The Ninth Circuit In Los Angeles Memorial Coliseum And The Instant Decision Of The Third Circuit Directly Conflict On Two Overriding Issues.

At the heart of the *L.A. Coliseum* case before the Ninth Circuit were respondents' companion agreements to prevent Al Davis (one of respondents) from moving his team from Oakland to the Los Angeles Memorial Coliseum, and to refuse to put a new (expansion) team in the Coliseum. At the heart of the instant case before the Third Circuit were respondents' companion agreements to refuse to admit petitioners, who owned an established, operational, qualified team in Memphis, to play in the NFL, and to refuse to put any new (expansion) team in Memphis.[1] The Ninth Circuit had before it

1. The provision of the NFL's Constitution and By-Laws at issue in *L.A. Coliseum* was Article IV, §4.3, requiring in 1978 the unanimous vote of all 28 member teams to approve relocation of one member to the home territory of another member. In late 1978, after the Coliseum first brought suit, the provision was amended to require the favorable vote of three-quarters of the members. Slip Op. at 3-4 & n.1 (A-3 - A-4 *infra*.). The jury determined in *L.A. Coliseum* that even as amended the restraint was unreasonable, and the Ninth Circuit affirmed.

The provision of the By-Laws at issue in the instant litigation was Article III, §3.3(c), requiring in 1975 the vote of three-quarters (or 20, whichever was greater) of the existing members affirmatively approving each proposed owner or holder of any interest in the applicant for new membership. *See* Petn. Cert. at 5, 25. The Third Circuit held that this requirement was no restraint at all because there was no "competition" to be restrained.

an evidentiary record developed after extensive discovery and a full (second) trial to a jury. The Third Circuit had before it a truncated summary judgment record, expressly limited by the district court to the one, discrete area of whether respondents had applied objective standards in voting to refuse petitioner's application.

The *L.A. Coliseum* majority held that respondents were 28 separate business entities which, despite shared-revenue, were sufficiently independent, horizontal competitors as to require scrutiny under section 1 of the Sherman Act. Slip Op. at 15-17 (A-13-A-15 *infra.*). The Third Circuit in the instant case, on the other hand, held that because they shared revenues, respondents were not horizontal competitors, and in the absence of competition there was nothing for the Sherman Act to do. *See* Petition for Writ of Certiorari ("Petn. Cert."), at 8-9 & 16-17. The *L.A. Coliseum* majority held that the provision of the NFL's By-Laws there at issue had actually restrained competition in relevant markets (slip op. at 25-28 A-22-A-24 *infra.*)), and that it was intended on its face "to control, if not prevent, competition among the NFL teams through territorial division" (slip op. at 18 (A-16-A-17 *infra.*)). The Third Circuit on the other hand, by a bootstrapping tautology defying ratiocination, held in the instant case that because respondents had agreed not to compete for most of their revenue, there was for the most part no "competition" [2] which could be harmed by their agreement to exclude petitioners (*see* Petn. Cert. at 9, 17), and thus respondents' intent and motivation behind the exclusion were immaterial (*ibid.*).

The *L.A. Coliseum* majority held that to accept respondents' argument that they really do not compete, but necessarily act unitarily, "would immunize the NFL

2. In the one market where the Third Circuit accepted *arguendo* that respondents are horizontal competitors, the "raw materials" market for players and coaches services, etc., the Third Circuit held that the injury to competition in that market had not "caused" any injury to petitioners' business and thus petitioners could not complain of it. *See* Petn. Cert. At 9-10, 13-16.

from §1 scrutiny" (slip op. at 11-12 (A-10 *infra.*)), that the antitrust laws are sufficiently flexible to account for any legitimate need of these 28 businesses to act in concert (id. at 13-15, 45 (A-12 - A-13, A-37 *infra.*)), and that if the NFL wants immunity, "it must look to Congress for relief (id. at 45 (A-45 *infra.*)). The Third Circuit, on the other hand, held in the instant action that Congress has conferred monopoly power on respondents and that "the Congressionally authorized arrangements under which the NFL functions eliminate competition among league members" (720 F.2d at 786). *See* Petn. Cert. at 9, 17. There being no competition, the Third Circuit held that there was no cause of action under the Sherman Act for respondents' refusal to award a franchise at Memphis, even though arbitrary or intended to reserve the Memphis territory for themselves.

The *L.A. Coliseum* majority affirmed the jury's verdict that the restraint on team placement there imposed was unreasonable because there was substantial evidence both of less restrictive means to accommodate any legitimate NFL goals, of an absence of objective standards curtailing the members' ability to vote their own pocketbook interests, and of an absence of procedural due process protections. Slip Op. at 32-36 (A-27-A-30 *infra.*). In the instant case, on the other hand, the Third Circuit blythely dismissed petitioners' arguments that less restrictive alternatives, objective standards and procedural due process protections were required with the disingenuous rationale that these doctrines are predicated on the supposition that admission of the excluded party would result in additional competition. Since it could see no competition, the Third Circuit refused to apply these elementary doctrinal requirements of any antitrust analysis. *See* Petn. Cert. at 23-24 & 25-26. *Cf.* slip op. at 32 (existence of less restrictive alternatives "pertinent factor in all rule of reason cases").

Two issues, overarching all the rest, thus are crucial to the decisions in both *L.A. Coliseum* and the instant action. First: Are respondents sufficiently independent,

horizontal competitors as to require antitrust scrutiny of their concerted actions restraining trade? Second: Are respondents' arbitrary agreements, made without objective decisional guidelines, to divide territories and dole out franchises unreasonable restraints of trade? As to both, the *L.A. Coliseum* majority held "yes" and the Third Circuit held "no". There is, thus, a direct conflict between the Courts of Appeals on *two overriding issues:* whether the scope of the antitrust laws shall be so constricted by a narrow concept of "competition" that even an arbitrary exclusion of a new team in a new territory (or the expulsion of an existing team from an exclusive, old territory) is immune from judicial scrutiny; and whether any legitimate needs of respondents for a unitary, self-governing structure necessarily immunize all of respondents' "business judgments" from antitrust requirements of reasonableness and minimal anticompetitive impact.

CONCLUSION

To resolve this conflict between the circuits, this Court should grant the instant petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOS ANGELES MEMORIAL COLISEUM COMMISSION, *Plaintiff-Appellee,*	
vs.	
NATIONAL FOOTBALL LEAGUE, an unincorporated association, et al., *Defendants/Cross-Defendants-Appellants/ Cross-Appellees,*	
and	
NEW ENGLAND PATRIOTS FOOTBALL CLUB, INC., HIGHWOOD SERVICE, INC., EMPIRE SPORTS, INC., HOUSTON OILERS, INC., NEW YORK JETS FOOTBALL CLUB, INC., and CHARGERS FOOTBALL COMPANY, KANSAS CITY CHIEFS FOOTBALL CLUB, INC., and MIAMI DOLPHINS, LTD., *Defendants/Cross-Defendants-Appellants*	Nos. 82-5572 82-5573 82-5574 82-5664 82-5665 83-5714 83-5732 83-5938 D.C. No. CV 78-3523 HP OPINION
and	
LOS ANGELES RAMS FOOTBALL CO., *Defendants/Cross-Defendants-Appellant/ Cross-Appellee,*	
and	

OAKLAND-ALAMEDA COUNTY COLISEUM, INC., *Intervenor/Defendant-Appellant/Cross-Appellee,*

vs.

OAKLAND RAIDERS, LTD., *Cross-Claimant-Appellee/Cross-Appellant*

Appeals from the United States District Court
for the Central District of California

The Honorable Harry Pregerson, *Circuit Judge*,
Presiding by designation

Argued and submitted April 7, 1983

Before: ANDERSON and NELSON, *Circuit Judges*, and WILLIAMS, *District Judge*.*

J. BLAINE ANDERSON, *Circuit Judge*:

These appeals involve the hotly contested move by the Oakland Raiders, Ltd. professional football team from Oakland, California, to Los Angeles, California. We review only the liability portion of the bifurcated trial; the damage phase was concluded in May 1983 and is on a separate appeal. After a thorough review of the record and the law, we affirm.

I. FACTS

In 1978, the owner of the Los Angeles Rams, the late Carroll Rosenbloom, decided to locate his team in a

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* The Honorable Spencer M. Williams, United States District Judge for the Northern District of California, sitting by designation.

new stadium, the "Big A," in Anaheim, California. That left the Los Angeles Coliseum without a major tenant. Officials of the Coliseum then began the search for a new National Football League occupant. They inquired of the League Commissioner, Pete Rozelle, whether an expansion franchise might be located there but were told that at the time it was not possible. They also negotiated with existing teams in the hope that one might leave its home and move to Los Angeles.

The L.A. Coliseum ran into a major obstacle in its attempts to convince a team to move. That obstacle was Rule 4.3 of Article IV of the NFL Constitution. In 1978, Rule 4.3 required unanimous approval of all the 28 teams of the League whenever a team (or in the parlance of the League, a "franchise") seeks to relocate in the home territory of another team. Home territory is defined in Rule 4.1 as

> the city in which [a] club is located and for which it holds a franchise and plays its home games, and includes the surrounding territory to the extent of 75 miles in every direction from the exterior corporate limits of such city . . . .

In this case, the L.A. Coliseum was still in the home territory of the Rams.

The Coliseum viewed Rule 4.3 as an unlawful restraint of trade in violation of §1 of the Sherman Act, 15 U.S.C. §1, and brought this action in September of 1978. The district court concluded, however, that no present justiciable controversy existed because no NFL team had committed to moving to Los Angeles. 468 F. Supp. 154 (C.D. Cal. 1979).

The NFL nevertheless saw the Coliseum's suit as a sufficient threat to warrant amending Rule 4.3. In late 1978, the Executive Committee of the NFL, which is comprised of a voting member of each of the 28 teams, met and changed the rule to require only three-quarters

approval by the members of the League for a move into another team's home territory.[1]

Soon thereafter, Al Davis, managing general partner of the Oakland Raiders franchise, stepped into view. His lease with the Oakland Coliseum had expired in 1978. He believed the facility needed substantial improvement and he was unable to persuade the Oakland officials to agree to his terms. He instead turned to the Los Angeles Coliseum.

Davis and the L.A. Coliseum officials began to discuss the possibility of relocating the Raiders to Los Angeles in 1979. In January, 1980, the L.A. Coliseum believed an agreement with Davis was imminent and reactivated its lawsuit against the NFL, seeking a preliminary injunction to enjoin the League from preventing the Raiders' move. The district court granted the injunction, 484 F.Supp. 1274 (1980), but this court reversed, finding that an adequate probability of irreparable injury had not been shown. 634 F.2d 1197 (1980).

On March 1, 1980, Al Davis and the Coliseum signed a "memorandum of agreement" outlining the terms of the Raiders' relocation in Los Angeles. At an NFL meeting on March 3, 1980, Davis announced his intentions. In response, the League brought a contract

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1. Rule 4.3 originally read:

Any transfer of an existing franchise to a location within the home territory of any other club shall only be effective if approved by a unanimous vote; any other transfer shall only be effective if approved by the affirmative vote of not less than three-fourths or 20, whichever is greater, of the member clubs of the League.

After its 1978 amendment, Rule 4.3 states:

The League shall have exclusive control of the exhibition of football games by member clubs within the home territory of each member. No member club shall have the right to transfer its franchise or playing site to a different city, either within or outside its home territory, without prior approval by the affirmative vote of three-fourths of the existing member clubs of the League.

action in state court, obtaining an injunction preventing the move. In the meantime, the City of Oakland brought its much-publicized eminent domain action against the Raiders in its effort to keep the team in its original home. The NFL contract action was stayed pending the outcome of this litigation, but the eminent domain action is still being prosecuted in the California courts.

Over Davis' objection that Rule 4.3 is illegal under the antitrust laws, the NFL teams voted on March 10, 1980, 22-0 against the move, with five teams abstaining. That vote did not meet the new Rule 4.3's requirement of three-quarters approval.

The Los Angeles Memorial Coliseum Commission then renewed its action against the NFL and each member club. The Oakland-Alameda County Coliseum, Inc., was permitted to intervene. The Oakland Raiders cross-claimed against the NFL and is currently aligned as a party plaintiff.

The action was first tried in 1981, but resulted in a hung jury and mistrial. A second trial was conducted, with strict constraints on trial time. The court was asked to determine if the NFL was a "single business entity" and as such incapable of combining or conspiring in restraint of trade. Referring to the reasoning in its opinion written for the first trial, 519 F.Supp. 581, 585 (1981), the court concluded the League was not a "single entity." Vol. 12 Clerk's Record #931.

The district court denied the NFL's motions for change of venue, but did employ a detailed voir dire of the jury pool and of the jurors eventually empaneled. The trial was bifurcated so the jury could first determine liability. In the liability portion, counsel were limited to 40 hours of trial time per side in an effort to narrow the matters presented.

The trial was conducted and witnesses called, including owners of various NFL member teams and the League Commissioner, Pete Rozelle. The jury was in-

structed on the antitrust liability issues and sent out May 6, 1982. On May 7, 1982, the jury returned a verdict in favor of the Los Angeles Memorial Coliseum Commission and the Oakland Raiders on the antitrust claim and for the Raiders on their claim of breach of the implied promise of good faith and fair dealing. The court then continued the case to September 20, 1982, to begin the damages trial.

On June 14, 1982, the court issued its judgment on the liability issues, permanently enjoining the NFL and its member clubs from interfering with the transfer of the Oakland Raiders' NFL franchise from the Oakland Coliseum to the Los Angeles Memorial Coliseum. The court determined, in addition, that there was "no just reason for delay in entering this final judgment on plaintiff's and cross-claimant's claim for declaratory and equitable relief, and . . . expressly direct[ed] this final judgment be entered." Vol. 16 Clerk's Record #2090. The NFL and its original clubs immediately appealed the permanent injunction (No. 82-5572); the original clubs of the American Football League also appealed (No. 82-5573), as did the Los Angeles Rams Football Co. (No. 82-5574) and the Oakland-Alameda County Coliseum (No. 82-5664). The Oakland Raiders cross-appealed challenging six orders entered by the court in 1981 and 1982 (Nos. 82-5665 and 83-5398). The NFL and Oakland Coliseum have also appealed the failure of the district court to grant their post-trial motions. (Nos. 83-5714 and 83-5732).

The damages trial was completed in May 1983 with the jury returning a verdict awarding the Raiders $11.35 million and the Los Angeles Coliseum $4.86 million. These awards were trebled by the district court pursuant to 15 U.S.C. §15. The NFL and the other defendants have appealed. (Nos. 83-5907, 83-5908 and 83-5909). This panel will hear and decide the damage appeals. But, because these appeals were expedited, the damage

appeals will be decided in a later opinion after briefing, possible argument, and submission.[2]

II. SHERMAN ACT §1

The jury found that Rule 4.3 violates §1 of the Sherman Act, 15 U.S.C. §1. Section 1 literally prohibits every agreement, conspiracy, or other concerted activity in restraint of trade. Since Congress could not have intended that courts invalidate "every" such agreement, *see United States v. Joint Traffic Assn.*, 171 U.S. 505, 43 L.Ed. 259 (1898), most restraints are analyzed under the so-called "rule of reason." *Standard Oil of New Jersey v. United States*, 221 U.S. 1, 55 L.Ed. 619 (1911). The rule of reason requires the factfinder to decide whether under all the circumstances of the case the agreement imposes an unreasonable restraint on competition. *Arizona v. Maricopa County Medical Society*, _____ U.S. _____, _____, 73 L.Ed. 48, 58 (1982).

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2. Once in this court, the parties have continued their practice of affirmative lawyering and have filed multiple motions. The motions that have not been resolved up until this point are here discussed.

First, the NFL has moved this court for permission to supplement the record on the question of the effect of the stipulation entered into by the parties concerning relevant market. We grant the motion and will discuss the effect of the stipulation with the merits section, *infra*.

Second, the Raiders agreed to drop its cross-appeal if the judgment of antitrust liability and injunction is affirmed. As we are affirming that judgment, we dismiss the Raiders' cross-appeals, Nos. 82-5665 and 83-5938. It is unnecessary to address the NFL's and Oakland Coliseum's motions on this subject.

Finally, the Raiders have moved to dismiss the NFL's and Oakland Coliseum's appeals from the district court's denial of their Fed. R. Civ. P. 60(b) motions. This motion is granted. The district court lacked jurisdiction to consider this motion; its denial of the motion is not an appealable order. *Smith v. Lujan*, 588 F.2d 1304, 1307 (9th Cir. 1979). Also, the district court indicated no desire to entertain the motions if this court remanded this case back to it. *Id.* The appeals in Nos. 83-5714 and 83-5732 are dismissed.

Standard Oil, however, reconciled the earlier categorical prohibition with its own rule of reason by declaring that some restraints remain inherently unreasonable. 221 U.S. at 64-65. When judicial experience with a particular kind of restraint enables a court to predict with certainty that the rule of reason will condemn that restraint, the court will hold that the restraint is per se unlawful. *See United States v. Topco Associates, Inc.*, 405 U.S. 596, 31 L.Ed.2d 515 (1972). In other cases where judges lack the expert understanding of an industry's market structure and behavior to have such certainty, the court will consider facts peculiar to the industry, the nature of the restraint and its effect to determine whether that restraint promotes or restrains competition. *See Chicago Board of Trade v. United States*, 246 U.S. 231, 238, 62 L.Ed. 683, 687 (1918).

In the present case, the district judge found that the unique nature of the business of professional football made application of a per se rule inappropriate. 468 F.Supp. 154, 164-168 (1979). The court therefore instructed the jury that it was to decide whether Rule 4.3 was an unreasonable restraint of trade. The parties do not contest the appropriateness of this basic reasonableness inquiry. The NFL, however, raises two arguments against the lower court's judgment finding section 1 liability. First, the NFL contends that it is a single entity incapable of conspiring to restrain trade under section 1. Second, it insists that Rule 4.3 is not an unreasonable restraint of trade under section 1.

A. *Single Entity*

The NFL contends the league structure is in essence a single entity, akin to a partnership or joint venture, precluding application of Sherman Act section 1 which prevents only contracts, combinations or conspiracies in restraint of trade. The Los Angeles Coliseum and Raiders reject this position and assert the League is

composed of 28 separate legal entities which act independently.

The district court directed a verdict for plaintiffs on this issue and as a preliminary matter the NFL states the jury should have been allowed to decide the question. A directed verdict may be granted pursuant to Fed. R. Civ. P. 50(a) when, viewing the evidence in a light most favorable to the nonmoving party, the testimony and all the inferences that the jury could justifiably draw therefrom are insufficient to support any other finding. *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656, 661 (9th Cir.), *cert. denied*, 375 U.S. 922, 11 L.Ed.2d 165 (1963). When there is no substantial evidence to support a claim, i.e., only one conclusion can be drawn, the court must direct a verdict, even in an antitrust case. *Cleary v. Nat'l Distillers and Chemical Corp.*, 505 F.2d 695, 696 (9th Cir. 1974). Our review is *de novo*. *Santa Clara Valley Distributing Co. v. Pabst Brewing Co.*, 556 F.2d 942, 944 (9th Cir. 1977).

It is true, as the NFL contends, that the nature of an entity and its ability to combine or conspire in violation of §1 is a fact question. *Murray v. Toyota Motor Distributors, Inc.*, 664 F.2d 1377, 1379 (9th Cir.), *cert. denied*, 457 U.S. 1106, 73 L.Ed.2d 1314 (1982). It would be reversible error, then, to take the issue from the jury if reasonable minds could differ as to its resolution. *Id.* Here, however, the material facts are undisputed. How the NFL is organized and the nature and extent of cooperation among the member clubs is a matter of record; the NFL Constitution and Bylaws contain the agreement. Based on the undisputed facts and the law on this subject, the district court correctly decided this issue.

The district court cited three reasons for rejecting the NFL's theory. Initially, the court recognized the logical extension of this argument was to make the League incapable of violating Sherman Act §1 in every other subject restriction — yet courts have held the League violated §1 in other areas. 519 F.Supp. at 583. Secondly,

other organizations have been found to violate §1 though their product was "just as unitary . . . and requires the same kind of cooperation from the organization's members." *Id.* Finally, the district court considered the argument to be based upon the false premise that the individual NFL "clubs are not separate business entities whose products have an independent value." 519 F.Supp. at 584. We agree with this reasoning.

NFL rules have been found to violate §1 in other contexts. Most recently, the Second Circuit analyzed the NFL's rule preventing its member-owners from having ownership interests in other professional sports clubs. *North American Soccer League v. National Football League*, 670 F.2d 1249, 1257-1259 (2d Cir.), *cert. denied*, _____ U.S. _____, 74 L.Ed.2d 639 (1982). It recognized the cooperation necessary among league members, even characterizing the NFL as a joint venture, but nonetheless applied rule of reason analysis and found the cross-ownership rule violated §1. Other courts have held the League rules governing player contracts violate §1 of the Sherman Act. *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976); *Kapp v. NFL*, 390 F.Supp. 73 (N.D. Cal. 1974), *appeal vacated*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907, 60 L.Ed.2d 375 (1979). As noted by the Second Circuit in *Soccer League*, a finding of single entity status would immunize the NFL from §1 scrutiny:

> To tolerate such a loophole would permit league members to escape antitrust responsibility for any restraint entered into by them that would benefit their league or enhance their ability to compete even though the benefit would be outweighed by its anticompetitive effects. Moreover, the restraint might be one adopted more for the protection of individual league members from competition than to help the league.

670 F.2d at 1257.

Cases applying the single entity or joint venture theory in other business areas also contradict the NFL's argument. As stated by the Supreme Court:

> Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labelling the project a "joint venture." Perhaps every agreement and combination in restraint of trade could be so labeled.

Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598, 95 L.Ed. 1199, 1206 (1951). *Timken* involved an allegation of territorial division among three companies that shared partial common ownership. In *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 141-142, 20 L.Ed.2d 982, 992 (1968), the Court reiterated that common ownership will not suffice to preclude the application of §1. While these cases and others have been the subject of some criticism, *see, e.g.*, M. Handler and T. Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 Cardozo Law Review 23 (1981), they remain the law. In recognition that a broad application of *Timken* and *Perma Life* could subvert legitimate procompetitive business associations, this circuit has found the threshold requirement of concerted activity missing among "multiple corporations operated as a single entity" when "corporate policies are set by one individual or by a parent corporation." *General Business Systems v. North American Philips Corp.*, 699 F.2d 965, 980 (9th Cir. 1983); *see Thomsen v. Western Electric Co.*, 680 F.2d 1263, 1266 (9th Cir.), *cert. denied*, ____ U.S. ____, 74 L.Ed.2d 387 (1982); *Las Vegas Sun, Inc. v. Summa Corp.*, 610 F.2d 614, 617 (9th Cir. 1979), *cert. denied*, 447 U.S. 906, 64 L.Ed.2d 855 (1980). The facts make it clear the NFL does not fit within this exception. While the NFL clubs have certain common purposes, they do not operate as a single entity.

NFL policies are not set by one individual or parent corporation, but by the separate teams acting jointly.

It is true the NFL clubs must cooperate to a large extent in their endeavor in producing a "product"—the NFL season culminating in the Super Bowl. The necessity that otherwise independent businesses cooperate has not, however, sufficed to preclude scrutiny under §1 of the Sherman Act. In *Associated Press v. United States*, 326 U.S. 1, 89 L.Ed. 2013 (1945), the Supreme Court rejected the assertion that the AP was immune from section 1 because it was a necessary cooperative of independent newspapers which produced a product its individual members could not. *Id.* at 26, 89 L.Ed. at 2034 (Frankfurter, J., concurring). More recently, the Court found the cooperation required among ostensible competitors in arranging blanket licensing of copyrighted songs precluded only a finding of per se illegality; instead, rule of reason analysis was the proper method to determine the legality of the arrangement. *Broadcast Music, Inc. v. Columbia Broadcast System, Inc.*, 441 U.S. 1, 60 L.Ed.2d 1 (1979);[3] *see also Silver v. New York Stock Exchange*, 373 U.S. 341, 10 L.Ed.2d 389 (1963).

The case of *United States v. Sealy, Inc.*, 388 U.S. 350, 18 L.Ed.2d 1238 (1967), is closely on point. Sealy

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3. On remand in *Broadcast Music* the Second Circuit did not conclude, as the NFL claims, that rule of reason analysis was unnecessary. It found only that it was unnecessary to balance the pro and anticompetitive effects of the blanket licensing arrangement because no anticompetitive effects were proven. *Columbia Broadcasting System, Inc. v. American Society of Composers*, 620 F.2d 930, 934-935 (2d Cir. 1980), *cert. denied*, 450 U.S. 970, 67 L.Ed.2d 621 (1981). As will be discussed below, that reasoning squares with this circuit's view that a showing of anticompetitive effect is a threshold rule of reason consideration. *See Cascade Cabinet Co. v. Western Cabinet & Millwork, Inc.*, 710 F.2d 1366, 1373 (9th Cir. 1983).

licensed manufacturers to sell bedding products under the Sealy name and allocated territories to the licensees. The facts showed, however, that this arrangement was not vertical but horizontal; the 30 licensees, owning all of the stock of Sealy, controlled all its operations. 388 U.S. at 352-353, 18 L.Ed.2d at 1242. Describing the Sealy organization as a joint venture, the Court nonetheless found it a per se violation of the Sherman Act. *See also United States v. Topco Associates, Inc.*, 405 U.S. 596, 609, 31 L.Ed.2d 515, 526 (1972) (Court finding a per se violation on facts similar to Sealy).

The NFL structure is very similar to that in *Sealy*. The League itself is only in very limited respects an identity separate from the individual teams. It is an unincorporated, not-for-profit, "association." It has a New York office run by the Commissioner, Pete Rozelle, who makes day-to-day decisions regarding League operations. Its primary functions are in the areas of scheduling, resolving disputes among players and franchises, supervising officials, discipline and public relations. The decision involved here on territorial divisions is made by the NFL Executive Committee which is comprised of a representative of each club. Even though the individual clubs often act for the common good of the NFL, we must not lose sight of the purpose of the NFL as stated in Article I of its constitution, which is to "promote and foster the primary business of League members." Although the business interests of League members will often coincide with those of the NFL as an entity in itself, that commonality of interest exists in every cartel. As in *Sealy*, we must look behind the label proffered by the defendants to determine the substance of the entity in question. 388 U.S. at 353, 18 L.Ed.2d at 1242.

Our inquiry discloses an association of teams sufficiently independent and competitive with one another to warrant rule of reason scrutiny under § 1 of the Sherman Act. The NFL clubs are, in the words of the district court, "separate business entities whose products have

an independent value." 519 F.Supp. at 584. The member clubs are all independently owned. Most are corporations, some are partnerships, and apparently a few are sole proprietorships. Although a large portion of League revenue, approximately 90%, is divided equally among the teams, profits and losses are not shared, a featured common to partnerships or other "single entities." In fact, profits vary widely despite the sharing of revenue. The disparity in profits can be attributed to independent management policies regarding coaches, players, management personnel, ticket prices, concessions, luxury box seats, as well as franchise location, all of which contribute to fan support and other income sources.

In addition to being independent business entities, the NFL clubs do compete with one another off the field as well as on to acquire players, coaches, and management personnel. In certain areas of the country where two teams operate in close proximity, there is also competition for fan support, local television and local radio revenues, and media space.

These attributes operate to make each team an entity in large part distinct from the NFL. It is true that cooperation is necessary to produce a football game. However, as the district court concluded, this does not mean, "that each club can produce football games only as an *NFL* member." 519 F.Supp. at 584. This is especially evident in light of the emergence of the United States Football League.

For the foregoing reasons, we affirm the district court's rejection of the NFL's single entity defense.[4] Of

4. One district court case has reached the opposite conclusion in a somewhat similar context. In *San Francisco Seals, Ltd. v. National Hockey League*, 379 F.Supp. 966 (C.D. Cal. 1974), the court upheld the NHL's right to preclude the Seals' proposed move to Vancouver. The court found both that the NHL is a single entity incapable of conspiring in violation of §1 of the Sherman Act and that the denial of the move had no anticompetitive effect. A recent law review article argues that the court in *Seals* correctly decided

course, the singular nature of the NFL will need to be accounted for in discussing the reasonableness of the restriction on team movement, but it is not enough to preclude §1 scrutiny. The NFL's related argument that Rule 4.3 is valid as a restraint ancillary to a joint venture agreement will be discussed in the rule of reason analysis that follows. Contrary to the NFL's apparent belief, the ancillary restraint doctrine is not independent of the rule of reason. *National Society of Professional Engineers*, 435 U.S. at 689, 55 L.Ed.2d at 648; *see* R. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 Yale L.J. 775, 796-801 (1965).

B. *Rule of Reason*

In *Chicago Board of Trade v. United States*, 246 U.S. 231, 238, 62 L.Ed. 683, 687 (1918), Justice Brandeis announced what has become the classic approach used in rule of reason analysis:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily con-

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the single entity issue. M. Grauer, *Recognition of the National Football League as a Single Entity under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 Mich. L. Rev. 1 (1983). Although *Seals* and this article offer persuasive reasons for recognizing the NFL as a single entity, we do not find these reasons so compelling that existing precedent can be ignored or that we should grant this association of 28 independent businesses blanket immunity from attack under §1 of the Sherman Act. The unitary nature of the NFL can be accounted for by analyzing the competitive harms and benefits of Rule 4.3 under the rule of reason, without impinging on Congress' authority to decide whether a specific industry deserves an exemption from the antitrust laws. *See Jefferson County Pharmaceuticals v. Abbott Laboratories*, ___ U.S. ___, 74 L.Ed.2d 882, 890-91 (1983); *see also United States v. Cooper Corp.*, 312 U.S. 600, 606, 85 L.Ed. 1071, 61 S.Ct. 742 (1941).

> sider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation, or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

As elaborated upon by this circuit: "Rule of reason analysis calls for a 'thorough investigation of the industry at issue and a balancing of the arrangement's positive and negative effects on competition.' " *Cascade Cabinet*, 710 F.2d at 1373 (quoting *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1050 (9th Cir. 1983)). This balancing process is not applied, however, until after the plaintiff has shown the challenged conduct restrains competition. *Cascade Cabinet*, 710 F.2d at 1373. To establish a cause of action, plaintiff must prove these elements: "(1) An agreement among two or more persons or distinct business entities; (2) Which is intended to harm or unreasonably restrain competition; (3) And which actually causes injury to competition." *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 290 (9th Cir. 1979), *cert. denied*, 447 U.S. 924, 65 L.Ed.2d 1116 (1980); *accord Reid Brothers Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d 1292, 1296 (9th Cir. 1983).

Our rejection of the NFL's single entity defense implicitly recognized the existence of the first element—the 28 member clubs have entered an agreement in the form of the NFL Constitution and Bylaws. As will be developed in more detail, we have no doubt the plaintiffs also met their burden of proving the existence of the second element. Rule 4.3 is on its face an agreement to control, if not prevent, competition among the NFL teams

through territorial divisions. The third element is more troublesome. It is in this context that we discuss the NFL's ancillary restraint argument. Also, a showing of injury to competition requires "[p]roof that the defendant's activities had an impact upon competition in a relevant market," *Kaplan*, 611 F.2d at 291, proof that "is an absolutely essential element of a rule of reason case." *Id.*; *see Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 901 (9th Cir. 1983).

Other courts have applied rule of reason analysis to determine the legality of concerted action undertaken by the NFL and for the most part have found such action illegal. *E.g.*, *North American Soccer League*, 670 F.2d 1249; *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801, 54 L.Ed.2d 59 (1977). The instant case is the first of this type in this circuit, however, and the first in which a member club has questioned the legality of NFL rules.

In a quite general sense, the case presents the competing considerations of whether a group of businessmen can enforce an agreement with one of their co-contractors to the detriment of that co-contractor's right to do business where he pleases. More specifically, this lawsuit requires us to engage in the difficult task of analyzing the negative and positive effects of a business practice in an industry which does not readily fit into the antitrust context. Section 1 of the Sherman Act was designed to prevent agreements among competitors which eliminate or reduce competition and thereby harm consumers. Yet, as we discussed in the context of the single entity issue, the NFL teams are not true competitors, nor can they be.

The NFL's structure has both horizontal and vertical attributes. *See, e.g., Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 53 L.Ed.2d 568 (1977). On the one hand, it can be viewed simply as an organization of 28 competitors, an example of a simple horizontal ar-

rangement. On the other, and to the extent the NFL can be considered an entity separate from the team owners, a vertical relationship is disclosed. In this sense the owners are distributors of the NFL product, each with its own territorial division. In this context it is clear that the owners have a legitimate interest in protecting the integrity of the League itself. Collective action in areas such as League divisions, scheduling and rules must be allowed, as should other activity that aids in producing the most marketable product attainable. Nevertheless, legitimate collective action should not be construed to allow the owners to extract excess profits. In such a situation the owners would be acting as a classic cartel. Agreements among competitors, i.e., cartels, to fix prices or divide market territories are presumed illegal under §1 because they give competitors the ability to charge unreasonable and arbitrary prices instead of setting prices by virtue of free market forces. *See United States v. Trenton Potteries Co.*, 273 U.S. 392, 397, 71 L.Ed. 700, 705 (1927); *United States v. Topco Associates*, 405 U.S. at 611, 31 L.Ed.2d at 527-528.

On its face, Rule 4.3 divides markets among the 28 teams, a practice presumed illegal, but, as we have noted, the unique structure of the NFL precludes application of the per se rule. *North American Soccer League*, 670 F.2d at 1258-1259; *see Cascade Cabinet Co. v. Western Cabinet & Millwork, Inc.*, 710 F.2d 1366, 1370-1373 (9th Cir. 1983). Instead, we must examine Rule 4.3 to determine whether it reasonably serves the legitimate collective concerns of the owners or instead permits them to reap excess profits at the expense of the consuming public.

1. Relevant Market

The NFL contends it is entitled to judgment because plaintiffs failed to prove an adverse impact on competition in a relevant market. The NFL's claim that

it is entitled to judgment notwithstanding the verdict is governed by the same standards as a motion for directed verdict, discussed above. The court is not permitted to account for witness credibility, weigh the evidence or reach a different result it finds more reasonable as long as, viewing the evidence in a light most favorable to the nonmoving party, the jury's verdict is supported by substantial evidence. *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1026 (9th Cir. 1981), *cert. denied*, ____ U.S. ____, 74 L.Ed. 61 (1982).

The relevant market provides the basis on which to balance competitive harms and benefits of the restraint at issue. *See Kaplan*, 611 F.2d at 291; *see also Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 268-269 (7th Cir. 1981), *cert. denied*, 455 U.S. 921, 71 L.Ed.2d 461 (1982). Such evidence is essential in a section 1 case. *See Continental TV, Inc.*, 433 U.S. at 53 n.21, 53 L.Ed.2d at 582, n.21 ("an antitrust policy divorced from market considerations would lack any objective benchmarks").

In the present case, the parties entered a stipulation regarding relevant market evidence because the time allowed for witnesses in the second trial was restricted by the trial court. The stipulation provided that no experts would be called to testify on the subject. Instead, the transcripts and exhibits used by the economic experts were deemed incorporated in the record and admitted in evidence at the retrial, allowing counsel to argue market issues as if the experts had testified before the jury. Our review shows, however, that neither the transcripts nor the exhibits were placed before the jury. We are surprised that in a trial of this magnitude these able attorneys would neglect such important evidence. Upon a careful review of the record, however, we find that testimony of others was sufficient to cover the subject where necessary, and to guide the jury's finding that Rule 4.3 is an unreasonable restraint of trade.

In the antitrust context, the relevant market has two components: the product market and the geographic market. Product market definition involves the

> process of describing those groups of producers which, becuse [*sic.*] of the similarity of their products, have the ability — actual or potential — to take significant amounts of business away from each other. A market definition must look at all relevant sources of supply, either actual rivals or eager potential entrants to the market.

Kaplan, 611 F.2d at 292 (quoting *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1063 (3d Cir.), *cert. denied*, 439 U.S. 838, 58 L.Ed.2d 134 (1978)). Two related tests are used in arriving at the product market: first, reasonable interchangeability for the same or similar uses; and second, cross-elasticity of demand, an economic term describing the responsiveness of sales of one product to price changes in another. *Id.* at 291; see 3 J. von Kalinowski, *Antitrust Laws* and Trade Regulations, §8.02[2] (1983). Similar considerations determine the relevant geographic market, which describes the "economically significant" area of effective competition in which the relevant products are traded. *Kaplan*, 611 F.2d at 292 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 8 L.Ed.2d 510 (1962)).

The claims of the Raiders and the L.A. Coliseum, respectively, present somewhat different market considerations. The Raiders attempted to prove the relevant market consists of NFL football (the product market) in the Southern California area (the geographic market). The NFL argues it competes with all forms of entertainment within the United States, not just Southern California. The L.A. Coliseum claims the relevant market is stadia offering their facilities to NFL teams (the product market) in the United States (the geographic market). The NFL agrees with this geographic market, but argues the product market involves cities competing for all

forms of stadium entertainment, including NFL football teams.

That NFL football has limited substitutes from a consumer standpoint is seen from evidence that the Oakland Coliseum sold out for 10 consecutive years despite having some of the highest ticket prices in the League. A similar conclusion can be drawn from the extraordinary number of television viewers — over 100 million people — that watched the 1982 Super Bowl, the ultimate NFL product. NFL football's importance to the television networks is evidenced by the approximately $2 billion they agreed to pay the League for the right to televise the games from 1982-1986. This contract reflects the networks' anticipation that the high number of television viewers who had watched NFL football in the past would continue to do so in the future.

To some extent, the NFL itself narrowly defined the relevant market by emphasizing that NFL football is a unique product which can be produced only through the joint efforts of the 28 teams. Don Shula, coach of the Miami Dolphins, underscored this point when he stated that NFL football has a different set of fans than college football.

The evidence from which the jury could have found a narrow pro football product market was balanced, however, with other evidence which tended to show the NFL competes in the first instance with other professional sports, especially those with seasons that overlap with the NFL's. On a broader level, witnesses such as Pete Rozelle and Georgia Frontierre (owner of the L.A. Rams) testified that NFL football competes with other television offerings for network business, as well as other local entertainment for attendance at the games.

In terms of the relevant geographic market, witnesses testified, in particular Al Davis, that NFL teams compete with one another off the field for fan support in those areas where teams operate in close proximity such

as New York City-New Jersey, Washington, D.C.-Baltimore, and formerly San Francisco-Oakland. Davis, of course, had firsthand knowledge of this when his team was located in Oakland. Also, the San Francisco Forty-Niners and the New York Giants were paid $18 million because of the potential for harm from competing with the Oakland Raiders and the New York Jets, respectively, once those teams joined the NFL as a result of the merger with the American Football League. Al Davis also testified at length regarding the potential for competition for fan support between the Raiders and the Los Angeles Rams once his team relocated in Los Angeles.

Testimony also adequately described the parameters of the stadia market. On one level, stadia do compete with one another for the tenancy of NFL teams. Such competition is shown by the Rams' move to Anaheim. Carroll Rosenbloom was offered what he considered to be a more lucrative situation at the Big A Stadium, so he left the L.A. Coliseum. In turn, the L.A. Coliseum sought to lure existing NFL teams to Los Angeles. Competition between the L.A. Coliseum and the Oakland Coliseum for the tenancy of the Raiders resulted.

It is true, as the NFL argues, that competition among stadia for the tenancy of professional football teams is presently limited. It is limited, however, because of the operation of Rule 4.3. Prior to this lawsuit, most teams were allowed to relocate only within their home territory. That is why Carroll Rosenbloom could move his team to Anaheim. This is not to say the *potential* for competition did not previously exist. There was evidence to the effect that the NFL in the past remained expressly noncommitted on the question of team movement. This was done to give owners a bargaining edge when they were renegotiating leases with their respective stadia. The owner could threaten a move if the lease terms were not made more favorable.

The NFL claims that it is places, not particular stadia, that compete for NFL teams. This is true to a point because the NFL grants franchises to locales (generally a city and a 75 mile radius extending from its boundary). It is the individual stadia, however, which are most directly impacted by the restrictions on team movement. A stadium is a distinct economic entity and a territory is not.

It is also undoubtedly true, as the NFL contends, that stadia attempt to contract with a variety of forms of entertainment for exhibition in their facilities. In the case of the L.A. Coliseum, this includes college football, concerts, motorcycle races and the like. An NFL football team, however, is an especially desirable tenant. The L.A. Coliseum, for example, had received the highest rent from the Rams when they played there. We find that this evidence taken as a whole provided the jury with an adequate basis on which to judge the reasonableness of Rule 4.3 both as it affected competition among NFL teams and among stadia.

We conclude with one additional observation. In the context of this case in particular, we believe that market evidence, while important, should not become an end in itself. Here the exceptional nature of the industry makes precise market definition especially difficult. To a large extent the market is determined by how one defines the entity: Is the NFL a single entity or partnership which creates a product that competes with other entertainment products for the consumer (e.g., television and fans) dollar? Or is it 28 individual entities which compete with one another both on and off the field for the support of the consumers of the more narrow football product? Of course, the NFL has attributes of both examples and a variety of evidence was presented on both views. In fact, because of the exceptional structure of the League, it was not necessary for the jury to accept absolutely either the NFL's or the plaintiff's market definitions. Instead, the critical question is whether the jury

could have determined that rule 4.3 reasonably served the NFL's interest in producing and promoting its product, i.e, competing in the entertainment market, or whether Rule 4.3 harmed competition among the 28 teams to such an extent that any benefits to the League as a whole were outweighed. As we find below, there was ample evidence for the jury to reach the latter conclusion.

2. The History and Purpose of Rule 4.3

The NFL has awarded franchises exclusive territories since the 1930's. In the early days of professional football, numerous franchises failed and many changed location in the hope of achieving economic success. League members saw exclusive territories as a means to aid stability, ensuring the owner who was attempting to establish an NFL team in a particular city that another would not move into the same area, potentially ruining them both.

Rule 4.3 is the result of that concern. Prior to its amendment in 1978, it required unanimous League approval for a move into another team's home territory. That, of course, gave each owner an exclusive territory and he could vote against a move into his territory solely because he was afraid the competition might reduce his revenue. Notably, however, the League constitution required only three-quarters approval for all other moves. The 1978 amendment removed the double-standard, and currently three-quarters approval is required for all moves.

That the purpose of Rule 4.3 was to restrain competition among the 28 teams may seem obvious and it is not surprising the NFL admitted as much at trial. It instead argues that Rule 4.3 serves a variety of legitimate League needs, including ensuring franchise stability. We must keep in mind, however, that the Supreme Court has long rejected the notion that "ruinous compe-

tition" can be a defense to a restraint of trade. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221, 84 L.Ed. 1129, 1167 (1940). Conversely, anticompetitive purpose alone is not enough to condemn Rule 4.3. *See Chicago Board of Trade*, 246 U.S. at 238, 62 L.Ed. at 687. The rule must actually harm competition, and that harm must be evaluated in light of the procompetitive benefits the rule might foster. *See Kaplan*, 611 F.2d at 291.

3. Ancillary Restraints and the Reasonableness of Rule 4.3

The NFL's primary argument is that it is entitled to judgment notwithstanding the verdict because under the facts and the law, Rule 4.3 is reasonable under the doctrine of ancillary restraints. The NFL's argument is inventive and perhaps it will breathe new life into this little used area of antitrust law, but we reject it for the following reasons.

The common-law ancillary restraint doctrine was, in effect, incorporated into Sherman Act section 1 analysis by Justice Taft in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211, 44 L.Ed. 136 (1899). R. Bork, *The Rule of Reason*, *supra* at 799-800. Most often discussed in the area of convenants not to compete, the doctrine teaches that some agreements which restrain competition may be valid if they are "subordinate and collateral to another legitimate transaction and necessary to make that transaction effective." *Id.* at 797-798; *see Addyston Pipe*, 85 F. at 281-82; *Lektro-Vend*, 660 F.2d at 265.

Generally, the effect of a finding of ancillarity is to "remove the *per se* label from restraints otherwise falling within that category." R. Bork, *Ancillary Restraints and the Sherman Act*, 15 Antitrust L.J. 211, 212 (1959). We assume, with no reason to doubt, that the agreement creating the NFL is valid and the territorial divisions

therein are ancillary to its main purpose of producing NFL football. The ancillary restraint must then be tested under the rule of reason, *id.*, the relevance of ancillarity being it "increases the probability that the restraint will be found reasonable." *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 901 (9th Cir. 1983). As we have already noted, the rule of reason inquiry requires us to consider the harms and benefits to competition caused by the restraint and whether the putative benefits can be achieved by less restrictive means.

The competitive harms of Rule 4.3 are plain. Exclusive territories insulate each team from competition within the NFL market, in essence allowing them to set monopoly prices to the detriment of the consuming public. The rule also effectively foreclosed free competition among stadia such as the Los Angeles Coliseum that wish to secure NFL tenants. *See Smith v. Pro Football, Inc.*, 593 F.2d at 1185. The harm from Rule 4.3 is especially acute in this case because it prevents a move by a team into another existing team's market. If the transfer is upheld, direct competition between the Rams and Raiders would presumably ensue to the benefit of all who consume the NFL product in the Los Angeles area.

The NFL argues, however, that territorial allocations are *inherent* in an agreement among joint venturers to produce a product. This inherent nature, the NFL asserts, flows from the need to protect each joint venturer in the "legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party." *Addyston Pipe & Steel*, 85 F. at 282. We agree that the nature of NFL football requires some territorial restrictions in order both to encourage participation in the venture and to secure each venturer the legitimate fruits of that participation.

Rule 4.3 aids the League, the NFL claims, in determining its overall geographical scope, regional balance and coverage of major and minor markets. Exclusive territories aid new franchises in achieving fi-

nancial stability, which protects the large initial investment an owner must make to start up a football team. Stability arguably helps ensure no one team has an undue advantage on the field. Territories foster fan loyalty which in turn promotes traditional rivalries between teams, each contributing to attendance at games and television viewing.

Joint marketing decisions are surely legitimate because of the importance of television. Title 15, U.S.C. §1291 grants the NFL an exemption from antitrust liability, if any, that might arise out of its collective negotiation of television rights with the networks. To effectuate this right, the League must be allowed to have some control over the placement of teams to ensure NFL football is popular in a diverse group of markets.

Last, there is some legitimacy to the NFL's argument that it has an interest in preventing transfers from areas before local governments, which have made a substantial investment in stadia and other facilities, can recover their expenditures. In such a situation, local confidence in the NFL is eroded, possibly resulting in a decline in interest. All these factors considered, we nevertheless are not persuaded the jury should have concluded that Rule 4.3 is a reasonable restraint of trade. The same goals can be achieved in a variety of ways which are less harmful to competition.

As noted by Justice Rehnquist, a factor in determining the reasonableness of an ancillary restraint is the "possibility of less restrictive alternatives" which could serve the same purpose. *See* Justice Rehnquist's dissent from the denial of certiorari in *North American Soccer League* ___U.S.___, 74 L.Ed.2d 639, 641 (1982); *Lektro-Vend*, 660 F.2d at 265. This is a pertinent factor in all rule of reason cases. *See Betaseed, Inc. v. U & I Inc.*, 681 F.2d 1203, 1228-30 (9th Cir. 1982); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 303 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093, 62 L.Ed.2d 783 (1980). Here, the district court correctly instructed the

jury to take into account the existence of less restrictive alternatives when determining the reasonableness of rule 4.3's territorial restraint. 32 T.R.2d at 7218; *see Betaseed, Inc.*, 681 F.2d 1203 at 1228; *Berkey Photo*, 603 F.2d at 303. Because there was substantial evidence going to the existence of such alternatives, we find that the jury could have reasonably concluded that the NFL should have designed its "ancillary restraint" in a manner that served its needs but did not so foreclose competition.

The NFL argues that the requirement of Rule 4.3 that three-quarters of the owners approve a franchise move is reasonable because it deters unwise team transfers. While the rule does indeed protect an owner's investment in a football franchise, no standards or durational limits are incorporated into the voting requirement to make sure that concern is satisfied. Nor are factors such as fan loyalty and team rivalries necessarily considered.

The NFL claims that its marketing and other objectives are indirectly accounted for in the voting process because the team owners vote to maximize their profits. Since the owners are guided by the desire to increase profits, they will necessarily make reasonable decisions, the NFL asserts, on such issues of whether the new location can support two teams, whether marketing needs will be adversely affected, etc. Under the present Rule 4.3, however, an owner need muster only seven friendly votes to prevent three-quarters approval for the sole reason of preventing another team from entering its market, regardless of whether the market could sustain two franchises. A basic premise of the Sherman Act is that regulation of private profit is best left to the marketplace rather than private agreement. *See United States v. Trenton Potteries*, 273 U.S. 392, 71 L.Ed. 700 (1927). The present case is in fact a good example of how the market itself will deter unwise moves, since a team will

not lightly give up an established base of support to confront another team in its home market.

The NFL's professed interest in ensuring that cities and other local governments secure a return on their investment in stadia is undercut in two ways. First, the local governments ought to be able to protect their investment through the leases they negotiate with the teams for the use of their stadia. Second, the NFL's interest on this point may not be as important as it would have us believe because the League has in the past allowed teams to threaten a transfer to another location in order to give the team leverage in lease negotiations.

Finally, the NFL made no showing that the transfer of the Raiders to Los Angeles would have any harmful effect on the League. Los Angeles is a market large enough for the successful operation of two teams, there would be no scheduling difficulties, facilities at the L.A. Coliseum are more than adequate, and no loss of future television revenue was foreseen. Also, the NFL offered no evidence that its interest in maintaining regional balance would be adversely affected by a move of a northern California team to southern California.

It is true, as the NFL claims, that the antitrust laws are primarily concerned with the promotion of *interbrand* competition. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51, 53 L.Ed.2d 568, 581, n.19 (1977). To the extent the NFL is a product which competes with other forms of entertainment, including other sports, its rules governing territorial division can be said to promote interbrand competition. Under this analysis, the territorial allocations most directly suppress intrabrand, that is, NFL team versus NFL team, competition. A more direct impact on intrabrand competition does not mean, however, the restraint is reasonable. The finder of fact must still balance the gain to interbrand competition against the loss of intrabrand competition. *See id.*, at 51-56. Here, the jury could have found that the rules restricting team movement do not sufficiently

promote interbrand competition to justify the negative impact on intrabrand competition.

To withstand antitrust scrutiny, restrictions on team movement should be more closely tailored to serve the needs inherent in producing the NFL "product" and competing with other forms of entertainment. An express recognition and consideration of those objective factors espoused by the NFL as important, such as population, economic projections, facilities, regional balance, etc., would be well advised. *See* L. Kurlantzick, *Thoughts on Professional Sports and the Antitrust Laws*, 15 Conn. L.R. 183, 206 (1983). Fan loyalty and location continuity could also be considered. *Id.* at 206-207. Al Davis in fact testified that in 1978 he proposed that the League adopt a set of objective guidelines to govern team relocation rather than continuing to utilize a subjective voting procedure.

Some sort of procedural mechanism to ensure consideration of all of the above factors may also be necessary, including an opportunity for the team proposing the move to present its case. *Id.*; *see Silver v. New York Stock Exchange*, 373 U.S. 341, 10 L.Ed.2d 389 (1963) (without procedural safeguards, the collective act of the Exchange in disconnecting the wire service to a broker constituted a boycott, per se illegal under §1); *cf. Deesen v. Professional Golfers Ass'n.*, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846, 17 L.Ed.2d 76 (1966) (where PGA had reasonable rules governing eligibility of players for tournaments, there was not a §1 violation). In the present case, for example, testimony indicated that some owners, as well as Commissioner Rozelle, dislike Al Davis and consider him a maverick. Their vote against the Raiders' move could have been motivated by animosity rather than business judgment.

Substantial evidence existed for the jury to find the restraint imposed by Rule 4.3 was not reasonably necessary to the production and sale of the NFL product. Therefore, the NFL is not entitled to judgment notwithstanding the verdict.

III. JURY INSTRUCTIONS

The NFL also claims it is entitled to a new trial because of error in the jury instructions. In particular, the NFL argues that the instructions lacked the specificity required in a complex lawsuit such as this, that certain of its legal theories should have been presented to the jury, and that the instructions failed to articulate all the requirements of the law for finding an unlawful restraint of trade. The L.A. Coliseum and the Raiders respond by stating that the instructions as given were entirely adequate and the NFL simply attempted to have the jury charged with a partisan and erroneous view of the law.

As required by Fed. R. Civ. P. 51, the NFL submitted proposed instructions and made timely objections when certain of its proposals were rejected. The question, then, is whether, viewing the jury instructions as a whole, the trial judge gave adequate instructions on each element of the case to insure that the jury fully understood the issues. *Ragsdell v. Southern Pacific Transportation Co.*, 688 F.2d 1281, 1282 (9th Cir. 1982); *Van Cleef v. Aeroflex Corp.*, 657 F.2d 1094, 1099 (9th Cir. 1981). A court is not required to use the exact words proposed by a party, incorporate every proposition of law suggested by counsel or amplify an instruction if the instructions as given allowed the jury to determine intelligently the issues presented. *Id.*; *Investment Service Co. v. Allied Equities Corp.*, 519 F.2d 508, 511 (9th Cir. 1975). Well-tailored and specific instructions may be necessary, however, in complex antitrust cases "where . . . abstract legal principles are not self-explanatory to a lay jury, and the facts to which they must be applied are complex." *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 466 n.13 (9th Cir.), *cert. denied*, 377 U.S. 993, 12 L.Ed.2d 1046 (1964). Also, a party is entitled to have theories supported by the evidence presented to the jury. *Reno-West Coast Distribution Co., Inc. v. Mead Corp.*, 613 F.2d 722, 725-726 (9th Cir.), *cert. denied*, 444 U.S.

927, 62 L.Ed.2d 183 (1979). The theory, of course, must have legal as well as factual support; if what is proposed is incorrect the court is not required to recast it in order to ensure the party's exact theory is before the jury, so long as the instructions describe the applicable law. *See id.*

The NFL first contends the instructions failed to emphasize the unique nature of the business of producing NFL football, a business, it argues, most aptly characterized as a joint venture. The trial court's rule of reason instruction, however, told the jury it should consider the "nature of" and "facts peculiar to" the industry and that "one factor you may consider is the degree of mutual cooperation inherent among the member clubs of a professional sports league and the extent to which professional sports leagues differ from ordinary kinds of businesses." 32 T.R.2d at 7216-7218. While not framed in the terms and detail requested by the NFL, this instruction did apprise the jury of the unique nature of NFL football. The trial court was not obliged to specifically instruct the jury on the NFL's theory that the restraint involved here is ancillary to a valid joint venture agreement. The Supreme Court has recognized that the "Rule of Reason . . . has been regarded as a standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 689, 55 L.Ed.2d 637, 648 (1978). The NFL's theory is subsumed within the rule of reason. As the district court emphasized, the NFL had every opportunity to present its view of the legality of Rule 4.3 to the jury. 32 T.R.2d at 7195, 7223. The NFL did just that in its closing argument. E.g., 33 T.R.2d at 7491-7495.

The NFL next argues the district court improperly rejected its instruction on causation. It is true the court did not instruct the jury on this element of proving when an injured party is entitled to treble damages under §4 of the Clayton Act. *See Brunswick v. Pueblo Bowl-O-Mat,*

429 U.S. 477, 489, 50 L.Ed.2d 701, 712 (1977); *see also Kapp v. National Football League*, 586 F.2d 644, 648 (9th Cir. 1978), *cert. denied*, 441 U.S. 907, 60 L.Ed.2d 375 (1979). In this bifurcated trial, however, the jury and the court were not faced with the question of the propriety of an award of damages, but with the question whether Rule 4.3 violated the antitrust laws and therefore could not be used to preclude the Raiders' move south. *Pueblo Bowl-O-Mat*, 429 U.S. at 491, 50 L.Ed.2d at 713. Whether the jury received proper instructions in this area is best left for the appeal of the damage portion of the trial.

The NFL also argues it was unduly prejudiced by the instructions because they focused on issues of competition among the NFL teams (intrabrand competition) rather than competition between the NFL "product" and other forms of entertainment (interbrand competition). As the NFL asserts, it is the suppression of interbrand competition that primarily concerns the antitrust laws. The trial court instructed the jury on the NFL's relevant market claim that it competes with all forms of entertainment. 32 T.R.2d at 7212-7215. In light of this instruction, the jury was not constrained to ascertain the reasonableness of Rule 4.3 solely in view of the internal NFL market.

There also was no error in the failure of the district court to charge the jury that it could balance the loss of competition in the San Francisco Bay Area against that to be gained in the Los Angeles area. The extent of the loss and gain to competition in these locations was a fact question that could be argued to the jury.

The NFL next argues that the trial court should have charged the jury that it could consider the procompetitive significance of public service and similar benefits, if any, that inure to Rule 4.3. We again find no error. As stated in *National Society of Professional Engineers*:

> the purpose of [either per se or rule of reason] analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of the industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.

435 U.S. at 692, 55 L.Ed.2d at 650. The judge instructed the jury that it should consider only procompetitive benefits of Rule 4.3. 32 T.R.2d at 7216. The NFL was permitted to argue that Rule 4.3 has procompetitive effects related to serving the public. No more is necessary.

The NFL's other assignments of error in the instructions are without merit. In sum, we are not persuaded that any lack of specificity misled the jury.

IV. VENUE

Oakland Coliseum, intervenor joined by the NFL, argues that the trial court abused its discretion by denying a change of venue motion made pursuant to 28 U.S.C. §1404(a). In relevant portion, §1404(a) allows a district court to change venue "in the interest of justice." Oakland Coliseum claims justice would have best been served by moving the case because it was impossible to secure an impartial jury in the Central District of California due to pretrial publicity and the economic interest of the prospective jurors in the outcome of the lawsuit. Prior to voir dire, the district court made a thoughtful and thorough analysis of Oakland's contentions in its memorandum and order denying the change of venue motion. 89 F.R.D. 497 (1981).

We will find an abuse of discretion warranting reversal only if Oakland Coliseum shows "that the setting of the trial was inherently prejudicial or that the jury selection process permits an inference of actual preju-

dice." *Murphy v. Florida*, 421 U.S. 794, 803, 44 L.Ed.2d 589, 597 (1975); *see Smith v. Phillips*, 455 U.S. 209, 215-217, 71 L.Ed.2d 78, 85-86 (1982); *Chandler v. Florida*, 449 U.S. 560, 581-582, 66 L.Ed.2d 740, 756 (1981); *United States v. Bailleaux*, 685 F.2d 1105, 1109 (9th Cir. 1982); *United States v. Brown*; 540 F.2d 364, 379 (8th Cir. 1976). Neither the pretrial publicity nor the alleged financial interest of the jurors compels such a finding.

We assume, with some basis, that the Raiders' proposed move and this lawsuit generated a large amount of publicity in the Los Angeles area. That in itself, however, is insufficient to compel a finding that the defendants were denied an impartial jury. *Dobbert v. Florida*, 432 U.S. 282, 302-303, 53 L.Ed.2d 344, 361-362 (1977); *Murphy v. Florida*, 421 U.S. at 800-802, 44 L.Ed.2d at 595-596. Only in those situations which are "utterly corrupted by press coverage" will we indulge in a presumption of actual prejudice on the part of any or all of the jurors. *Murphy*, 421 U.S. at 798, 44 L.Ed.2d at 594. No such showing has been made out here. The trial court used a very thorough voir dire process to ensure the jury panel members were not influenced by the publicity prior to trial, including administering a 48-page questionnaire prepared by the NFL to all prospective jurors, giving each side ten peremptory challenges instead of the normal three, and dismissing jurors for cause if even the slightest doubt of prejudice was raised. During the trial, the court admonished the jurors each day to refrain from exposure to any type of media coverage of the trial. In fact, one juror was excused because he admitted reading an unscreened newspaper, even though he adamantly denied reading anything but the Ann Landers column, the comics and the "Family Weekly" section. 23 T.R. 2d at 4705-4706, 4920. In view of the trial court's thorough cautionary actions, we cannot say either that he abused his discretion in denying a change of venue or

that defendants received an unfair trial because of the publicity.

Failing to show anything beyond the slightest speculation that publicity infected the fairness of the trial, Oakland Coliseum turns to the argument that the jurors had a financial interest in the outcome of the lawsuit which biased their decision. This contention is premised on the economic interest through lower taxes and business generation that residents of the Central District of California purportedly would have in the Raiders' presence in the L.A. Coliseum. The argument also seeks support in Supreme Court precedent such as *Withrow v. Larkin*, 421 U.S. 35, 43 L.Ed.2d 712 (1975), and *Tumey v. Ohio*, 273 U.S. 510, 71 L.Ed. 749 (1927), which stand for the proposition "that the probability of actual bias on the part of the judge or decisionmaker is too high . . . [when] the adjudicator has a pecuniary interest in the outcome." *Withrow*, 421 U.S. at 47, 43 L.Ed.2d at 723. Those cases do not mean, however, that an immeasurable and seemingly insignificant economic benefit to a taxpayer suffices to disqualify her or him as a juror. *Virginia Electric & Power Co. v. Sun Shipbuilding & Dry Dock Co.*, 389 F.Supp. 568, 571 (E.D. Va. 1975); *cf. United States v. Brown*, 540 F.2d 364, 379 (8th Cir. 1976) (there was no basis to strike jurors for cause merely on showing they resided in St. Louis and indictment alleged a scheme to defraud the city and its citizens).

Here, in fact, four of the eight jurors resided outside Los Angeles County. All the jurors were questioned during voir dire on their potential for any financially motivated bias and the judge was satisfied with the jurors' responses to his questions. Apparently recognizing the defects in its arguments, Oakland also alleges that the questioning and arguments of plaintiffs' counsel at trial were sufficient to convince the jurors to lay aside their sworn duties and decide the case on the bassis of "hometown" interests. We decline to engage in such

speculation about the mental processes of the individual jurors.

The other arguments made by Oakland on this issue, *such* as the one claiming it was denied a representative jury because the jury had no football fans, lack merit. Parties are not entitled to jurors of a particular bent or persuasion. They are entitled only to jurors as fair and impartial as all human circumstances and an evenhanded selection process permits. Nor do we believe the "cumulative" effect of the publicity, economic interests and the like show a sufficient likelihood of actual bias. Without more, we are compelled to affirm the denial of the change of venue motion and conclude that the defendants received a fair trial by an impartial jury.

V. CONCLUSION

The NFL is an unique business organization to which it is difficult to apply antitrust rules which were developed in the context of arrangements between actual competitors. This does not mean that the trial court and jury were incapable of meeting the task, however. The lower court correctly applied and described the law. The reasonableness of a restraint is a "paradigm fact question," *Betaseed, Inc. v. U and I Inc.*, 681 F.2d 1203, 1228 (9th Cir. 1982), and our review of the record convinces us the jury had adequate evidence to answer that question.

We believe antitrust principles are sufficiently flexible to account for the NFL's structure. To the extent the NFL finds the law inadequate, it must look to Congress for relief.

The judgment finding the NFL liable to the Los Angeles Coliseum and the Raiders, and enjoining the NFL from preventing the Raiders from relocating in Los Angeles is

AFFIRMED.

Spencer Williams, U.S.D.C. for the Northern District of California, sitting by designation; concurring in part, dissenting in part.

INTRODUCTION:

I respectfully dissent from the majority's opinion, insofar as it affirms the district judge's directed verdict that the N.F.L. was not a single entity as a matter of law.

The dispositive issue before this Court is whether the N.F.L.'s invocation of Rule 4.3 to block the Raiders' move to Los Angeles violates the letter and spirit of §1 of the Sherman Act, 15 U.S.C. §1. I conclude that the N.F.L. is, as a matter of law, a single entity insofar as this aspect of its operations is concerned, and not subject to the strictures of Sherman Act §1.

These appeals arise from the controversial relocation of the Raiders National Football League franchise ("Raiders") from Oakland, California to Los Angeles, California. Although many subsidiary procedural issues are posed on appeal, the case stands or falls on whether the trial judge properly concluded that the N.F.L. was not a "single entity", thereby exposing it to liability for Rule 4.3 under the Sherman Act, §1.

FACTS:

Our consideration of the issue whether or not Rule 4.3 of Article IV of the N.F.L. Constitution violates federal antitrust laws must turn on the relationship of Rule 4.3 to the structure of the league. For this reason, it is appropriate to briefly examine the history and nature of the N.F.L. as a business association, before addressing the issues raised on this appeal.

A. *The Relevant History of the N.F.L.*

The N.F.L. was established early in this century as an unincorporated business association, the members of

which were member franchise clubs dispersed throughout the United States. All but one of its members are privately owned and operated, and although members of the N.F.L. compete on the playing field, they act jointly in many aspects of their enterprise, as the term "league" implies.

The N.F.L.'s Constitution and By-Laws wield almost plenary control over member clubs' activities; the N.F.L. acts as the legislative entity which sets rules for, and schedules contests between member clubs, and regulates many other aspects of the operation of the professional football industry, (e.g., an annual draft of eligible college athletes), including the territorial restriction on franchise relocation found in Rule 4.3.

Of particular importance to our analysis is the fact that the N.F.L. Constitution provides for coordination of business activities and revenue sharing to an overwhelming degree. For example, the money derived from lucrative national broadcasting contracts is shared among league members according to agreed upon formulae, and this revenue makes up a large part of the revenue of each team. As to gate receipts for regularly scheduled contests between member clubs, there is a prearranged equation splitting gate admissions between the "home" and "visiting" clubs. Thus, each team relies, to a significant degree, on revenue jointly generated.[1] It is not surprising that, concomitant with this virtual "partnership" arrangement, of which the above-mentioned revenue sharing is most significant, other operating decisions which would normally be made by the owners of a single franchise are subordinated to specified consent of other other clubs. For example, establishment of a new franchise is submitted for approval to all

1. Indeed, no team could generate any revenue without drawing down upon the goodwill and reputation of the N.F.L. in the largest sense, or upon the status of any one scheduled opponent in an immediate sense, so that, in effect, all team revenue is jointly produced.

N.F.L. owners before any expansion is permitted. Agreements among owners regarding who shall have the right to employ certain athletes occur every year at an annual "draft" of available players.

At issue here is one aspect of the relationship among the member clubs of the N.F.L. as to when a member franchise club may be relocated to a city other than its original home. It is quite relevant to disposition of this instant suit that those challenging the legality of Rule 4.3 are the Raiders, presently a member club, and the L.A. Coliseum, a stadium seeking an N.F.L. tenant.

B. *The History of the Present Action.*

I agree in large part with the majority's review of the facts leading up to the two trials below. However, I would emphasize the troubling effect that the stipulation on the presentation of evidence in the second trial had upon the sufficiency of the evidence on relevant markets that was actually placed before the jury[2].

C. *The Various Appeals Pending before this Court.*

In addition to the appeal to which the majority and I turn our primary attention, several other motions are pending before this Court. It is these items, and the questions that these cross-appeals raise, that I now address.

Once in this Court, the parties have continued to file multiple, and somewhat conflicting, appeals. The motions that have not been resolved by the majority are largely different procedural means to accomplish the same ends; I discuss the more significant below.

First, the N.F.L. has moved this Court for permission to supplement the record on the question of the effect of the stipulation entered into by the parties

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2. See Majority Opinion at 21-28, and my discussion *infra* of the inconsistency left unanswered by the majority's treatment.

concerning the evidence introduced at the second trial on the relevant market. I find the majority's treatment of this matter interesting, inasmuch as it suggests that the issue of relevant market is no longer one for the jury; we admit to similar surprise that the very evidence that the parties thought at a minimum should have been placed before the jury was, in fact, never so placed in the second trial. Regardless of how the majority wishes to restate the manner in which relevant market is to be proven in this Circuit, its approach is to recharacterize the case as was tried, and suggest by inference that the plaintiff may discharge its burden of establishing the relevant product and geographic markets by a theoretical argument to the court, rather than by presenting evidence to a jury; this lynchpin of its "rule of reasonableness" cannot pass as innocuously by long-standing precedent as the majority would have it. Since I feel that it was error to submit Rule 4.3 to the jury in this context, I would not so strain the case as was tried the second time around to conform it to some new, and as yet undefined, rule of law.

Second, the Raiders cross-appeal from the district judge's rulings: (1) determining, on summary judgment, that N.F.L. Rule 4.3 was effectively amended on October 5, 1978; (2) that, as a matter of law, no contract was created between the Raiders and the N.F.L., on October 5, 1978; and, (3) that a directed verdict on behalf of Rozelle, Frontiere and Klein was appropriate, would presumably be withdrawn, under the majority's disposition; I would affirm the trial court's handling of all three matters.

Finally, as for the N.F.L.'s motion for remand of the injunctive judgment entered on June 14, 1982, with instructions to the court for a new trial, I find the matters raised by the motion in the alternative to the N.F.L.'s notice of appeal, especially the allegations surrounding the plaintiffs' suppression of a key document.

the "Hardy notes," distressing. I note that the majority's opinion does not deal with this issue.

DISCUSSION:

The district court found there were no disputed issues of material fact on the question of whether the N.F.L. was a single entity under the Sherman Act §1, insofar as its enforcement of Rule 4.3 was concerned, and directed a verdict for appellees concluding that it was not. Upon this finding, Rule 4.3 was submitted to the jury's scrutiny under the Rule of Reason analysis of the Sherman Act, §1.

Under established Ninth Circuit law, resolution of whether the N.F.L. had the capacity to violate Section 1 of the Sherman Act by conspiring *inter se* must be committed to the jury, if there exists "sufficient evidence in the record to permit a jury to find" that the N.F.L. was not a single entity, but "not . . . sufficient (evidence) to preclude the jury from finding otherwise." *Murray v. Toyota Motor Distributors, Inc.*, 664 F.2d 1377, 1379 (9th Cir. 1982) (*per curiam*).

In *Murray v. Toyota Motor Distributors, Inc., supra*, the Ninth Circuit held that the "single entity" question must not be taken from the jury where the evidence would *permit* a finding that the defendants are part of a single economic unit. As the majority in this case states: "(i)t would be reversible error, then, to take the issue from the jury if reasonable minds could differ as to its resolution". *Id.* I read the majority's opinion to find such an opportunity for "reasonable minds" to differ, even if the evidence that whether "the N.F.L. has attributes of a partnership or joint venture (was *not* "compelling", since it should have been submitted to the jury once there was simply "persuasive" evidence on either side. *C.f., Majority Opinion* at 10.

I agree however with the district court that there were no material issues of disputed fact as to whether

the N.F.L. was a single entity, and that the matter was ripe for disposition as a matter of law by the court. I also apply the settled rule of appellate review, that such decisions by the trial court are subject to *de novo* review by this Court. *C.f., General Business Systems v. North American Phillips Corp.*, 699 F.2d 965, 980-81 (9th Cir. 1983). But, the majority and I differ substantially in the conclusions to be drawn from such undisputed evidence.

The only realistic manner in which to define what constitutes a single entity for antitrust review is to focus upon the purpose the definition is to serve. "Single entity" taken in a functional sense begins and ends with an analysis of formal organizational and operational aspects of an enterprise, reconciled with the realities of the economic competition in the marketplace. If the aim of the Sherman Act §1 is consumer-dictated supply, unfettered by conspiracy between competing producers, — and, I submit that it is — extreme caution is warranted in defining precisely what competitive units exist in the marketplace. It is equally as important to permit collaboration and concerted action among branches of a single economic entity in the marketplace with impunity from the Sherman Act §1, as it is to police conspiracies between economic competitive entities. Nonetheless, all econimic units remain susceptible to challenge under the antitrust laws from those external entities injured by acts violative of §1, or competitive entities injured as result of monopoly, or attempted monopoly, in an industry under Sherman Act §2 tenets.

Resolving whether the N.F.L. is a single entity requires consideration of many factors, including formalistic aspects of operations such as ownership, overlapping directorates, joint marketing or manufacturing, legal identity, corporate law autonomy, and substantive aspects such as *de facto* autonomy of member clubs, chains of command over policy decisions, public percep-

tion and economic interdependency rendering otherwise independent member clubs subordinate to the integrated whole. When the entities in question are to be evaluated under the antitrust laws, the crucial criterion is whether the formally distinct member clubs compete in any economically meaningful sense in the marketplace. See *General Business Systems, supra* at 980-81.

The majority's attempt to reconcile its decision with that of *General Business Systems, supra*, is misleading and inaccurate. The text of the majority's opinion implies that corporate policies *must* be unitary for a business organization to be found a single entity. In *General Business Systems, supra*, at 980-81, the Circuit concluded that in any case in which the relationship between the two or more formal entities did "not fall clearly either of these extremes"; *i.e.*, "where corporate policies are set by one individual or a parent corporation" or where "jointly owned corporations that compete in the marketplace, hold themselves out to the public as competing organizations, and set policy independently . . ." (*id.* at 980), the case must be sent to the jury. This admonition was disregarded in this case — a paradigm case testing the functional "single entity" concept.

The district court placed an unwarranted emphasis upon the formalistic aspects of the relationship of the N.F.L. and the member clubs, ignoring the subtle, but yet more significant interdependency of the member clubs and the indivisibility of the clubs with the N.F.L. 519 F. Supp. 581, 582-83. For example, the district court makes much of two such formal organizational characteristics: separate incorporation and management. *Id.* But, when viewed from the mundane perspective of daily operations, emphasis upon these legal formalisms obscures the reality of life in the N.F.L. Only the athletic strategems are autonomous — albeit tightly constrained by league guidelines on eligibility, medical

and physical condition and exploitation of player talent. The N.F.L. cannot truly be separated from its member clubs, which are simultaneously franchisees and franchisors. The Raiders did not, and do not now, seek to compete with the other clubs in any sense other than in their win/loss standings; they do not challenge the plethora of other ancillary regulations attendant to the league structure, including the draft, regulation and scheduling of meetings between teams, and the system of pooled and shared revenues among the clubs because they wish to remain within its beneficial ambit.

> As the majority opinion correctly points out: this lawsuit requires us to engage in the difficult task of analyzing the negative and positive effects of a business practice in an industry which does not readily fit into the antitrust context. Section 1 of the Sherman Act was designed to prevent agreements among competitors which eliminate or reduce competition and thereby harm consumers. Yet, . . ., the N.F.L. teams *are not true competitors, nor can they be.*

Majority opinion, at 19, *emphasis added*. Yet, the majority's analysis falters in a similar manner. It is the commonality of, or necessary cooperation in, the means of production, not the formal structure of the ownership of the N.F.L. infrastructure which should be determinative of the classification of this enterprise.

The profound interdependency of the N.F.L. and member clubs in the daily operation and strategic marketing of professional football belies the district court's conclusion that each member club is an individual and economically meaningful competitor. The dispositive factor in determining whether the member clubs are capable of conspiring to restrain competition — the *sine qua non* of the Sherman Act § 1 — by reason of Rule 4.3, is the extent, if any, of their competition in an economic sense. Virtually every court to consider this question has

concluded that N.F.L. member clubs do *not* compete with each other in the economic sense. See *North American Soccer League v. N.F.L.*, 670 F.2d 1249, 1251 (2d Cir. 1982); *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1179 (D.C. Cir. 1978); *Mackey v. N.F.L.*, 543 F.2d 606, 619 (8th Cir. 1976); *Mid-South Grizzlies v. N.F.L.*, 550 F. Supp. 558, 562 (E.D. Pa. 1982); *U.S. v. N.F.L.*, 116 F. Supp. 319, 323-324 (E.D. Pa. 1953).

As the district court in *Mid-South Grizzlies* acknowledged, although

> (a)ll but one team are privately owned and operated . . . and 'compete' with one another on the playing field and for the top players, they act jointly in many aspects of their enterprise as the term league necessarily implies.

Mid-South Grizzlies, supra at 562. In adopting this view to reject a potential entrant's challenge to his exclusion from N.F.L. participation, the court in *Mid-South Grizzlies* recognized that the creation of many joint products, only the most tangible of which is the professional football season, as byproducts of the intangible "goodwill" are directly attributable to the present league/member club structure. *Id.* at 568. I agree with the other courts which, when presented with similar questions arising in professional hockey and basketball, realized that it is nonsensical to emphasis intrinsic worth of a franchise in a vacuum, when the value of the franchises are part and parcel of the quality and conformity insured by league regulation of the placement, ownership, and coordination of all on and off the field interaction of member clubs. See *San Francisco Seals, Ltd. v. National Hockey League*, 379 F. Supp. 966, 969-971 (C.D.Cal. 1974) (the N.H.L., although subject to full scope of the antitrust laws, is "one single business enterprise, competing against other similarly organized professional leagues"); *Levin v. National Basketball Association*, 385 F. Supp. 149, 150, 152 (S.D.N.Y. 1974)

("While it is true that the antitrust laws apply to a professional athletic league, and that joint action by members of a league can have antitrust implications this is not such a case.").

The majority's holding places the Ninth Circuit's ruling in conflict with every other circuit to consider this issue. As the majority points out, but misapplies, the Second Circuit found the N.F.L. to be a "unincorporated joint venture". *N.A.S.L. v. N.F.L.*, *supra* at 1257, (2d Cir.), *cert. denied*, ____ U.S. ____ (1982). The Fifth Circuit, in an obscure but quite scholarly opinion, analyzed the North American Soccer League to be like the N.F.L.; *i.e.*, a "joint employer" for labor relations purposes, upon an examination of its "N.F.L. - like" characteristics. *N.A.S.L. v. N.L.R.B.*, 613 F.2d 1379, 1382 (5th Cir. 1980). The Third Circuit, after reviewing the substantial history of "single entity" litigation in the professional sports leagues, endorsed the D.C. Circuit's conclusion that the N.F.L. was a "single entity" for purposes of Sherman Act §1, and thus not subject to "invocation of a *per se* rule" against "group boycotts", because: (1) "the N.F.L. clubs that had combined were *not* competitors in any *economic* sense" and "no team was 'interested in driving another team out of business'; and, (2) the N.F.L. clubs had not combined '*to exclude competitors or potential competitors* from their level of the market.' *Larry V. Muko, Inc. v. Southwestern PA., etc.*, 670 F.2d 421, 429, n.11 (3d Cir. 1982), citing *Smith v. Pro Football, Inc.*, 593 F.2d. 1173, 1178 (D.C. Cir. 1978). (*emphasis in original*). (Other citations omitted).

What these courts have all recognized, and what ultimately persuades me, is that functionally distinct units that cannot produce separate, individual goods or services absent coordination are inextricably bound in an economic sense, and must adopt certain intra-league instrumentalities to regulate the whole's "downstream output". In the case of the member clubs, this

"downsteam output" is professional football, and the organ of regulation is the unincorporated, not-for-profit, association commonly known as the N.F.L. There is virtually no practical distinction between the League, administered by the appointed Commissioner, *per se* and the member clubs; the N.F.L. represents to all clubs, including the Raiders, the least-costly and most efficient manner of reaching day-to-day decisions regarding the production of their main, and collectively produced product.

Although the N.F.L. determines matters of scheduling, resolving player disciplinary matters and inter-club disputes, supervising officials and public relations, as well as other routine matters, critical league decisions, such as the matter of franchise location, are submitted to an Executive Committee comprised of a representative of each club. There can be no instance of the Executive Committee acting in other than the collective interests of the member clubs, since by definition, that body's decisions are the consensus of N.F.L. members. There is no distinct interest of the N.F.L., since it exists solely to coordinate the members' participation in the joint production of professional football.

By riveting its attention upon the "single entity" issue, as a sort of talismanic affirmative defense to the appellees' charges here, the district court overlooked the dispositive inquiry of whether Rule 4.3, as an instrument of the N.F.L. member clubs, violated the Sherman Act §1, by restricting any economically independent entities from supplying goods or services related to professional football to the individual clubs. I use "upstream flow" as shorthand for products and services like players and coaches, television services, potential investors and the myriad of other integrated industries; member clubs do have independent and economically significant identities apart from the collective N.F.L. for the limited purposes of their extra-league dealings with those upstream suppliers. See Weistart & Lowell, *Law of Sports*, §5.11 (1978), 687, 692 esp. n. 86. Thus, §1 can and should

protect the competitive aspects of player drafts, disallow cross-ownership bans and exclusive television and equipment contracts, by insuring that any one club's interaction outside the confines of intra-league regulation of production of the sport is unfettered by the working of any intraleague rule.

This is the critical distinction between cases which invalidate various intraleague rules, and those which uphold them. That member clubs compete for investors and the services of talented players is underscored by the fact that, although aggregate revenues are shared among all member clubs, there is no intra-league regulation upon the form of investment by a member club's financial backers, the dividend policy, or operating expenses and expenditures of any member for player services. League regulations comport with economic reality in this sense; courts have merely applied a similar philosophy to other aspects of the professional leagues' operations, including, *inter alia*, club-player relationships. *See, e.g., Smith, supra* (N.F.L. player daft held to violate §1, even though N.F.L. teams not "economic" competitors, because it "forces each seller of football services to deal with one, and only one buyer, robbing the seller, as in any monopsonistic market, of any real bargaining power."); *Mackey, supra*, (only relevant market in which to evaluate "Rozelle Rule" was that "for players' services"); *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049, 1061 (C.D. Cal. 1971) (harm resulting from restriction on non-collegiate players' recruiting was these players' exclusion from market in which they sought to compete by reason of the monopoly power exerted by the N.B.A.); *accord, Linseman v. World Hockey Association*, 439 F. Supp. 1315, 1322 (D. Conn. 1977); *Kapp v. National Football League*, 390 F. Supp. 73, 81-82 (N.D. Cal. 1974), *appeal vacated*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979) ("(a) conceivable effect of th(e "ransom" or "Rozelle" rule) would be to *perpetually* restrain a player

from pursuing his occupation among the clubs of a league that holds a virtual monopoly of professional football employment in the United States", which "goes far beyond any possible need for fair protection . . . and imposes upon the player-employers or the purposes of the N.F.L. such undue hardship as to be an unreasonable restraint . . . ."); *c.f., North American Soccer League, et al. v. N.F.L., et al., supra,* (N.F.L. ban on cross-ownership of professional football and soccer league clubs violative of Sherman Act §1).

The paradox to which I return, as the root of why the N.F.L., as well as other sports leagues, must be regarded as a "single entity" is that the keener the on-field competition becomes, the more successful their off-the-field, and ultimately legally relevant, collaboration. The formal entities, including the member clubs — including the Raiders — which the district court ruled to be competitors cannot compete, because the only product or service which is in their separate interests to produce can only result as a fruit of their joint efforts. This systemic cooperation trickles down to all members of the league, regardless of their on-the-field record, at least to the extent of the shared revenues. As at least one district court has previously recognized, despite some limited independently earned profit from "team paraphernalia" and "local broadcast revenues",

> (a) franchise's popularity is inextricably bound up with the quality of its competition on the playing field and the resulting excitement and sense of team loyalty.

Mid-South Grizzlies, supra, at 568. The ability to accrue separately accounted and disbursed profit, of which the district court made much, "is an indirect benefit of being a member of the league". *Id.*

A ruling that the N.F.L. cannot enforce Rule 4.3 is effectively ruling that it may not enforce any collective decision of its member clubs over the dissent of a club

member, although this is precisely what each owner has contractually bargained for in joining the enterprise. Without power to reach collective decisions, the N.F.L. structure becomes superfluous, and professional sports, without a cost-effective policing mechanism such as the league, will dissolve in the face of uncontrollable free-riding and loss of economies of scale. *Broadcast Music, Inc. v. Columbia Broadcast System, Inc.*, 441 U.S. 1 (1979).

Not only did the district court underrate the business scenario in which the member teams cooperate far more than they compete in the legally irrelevant on-field sense, but its directed verdict on the single entity issue ignored two significant aspects of the N.F.L.'s organization. First, the N.F.L. member clubs pool their revenues to a degree unique even among sporting leagues. By focusing upon the separate calculation of profits and loss by members, the district court elevated form over substance. Profit, as currently understood in the accounting profession, is a term of art, and as such is inherently subjective, often manipulated by equity interests to serve legally irrelevant business motives. The relevant consideration, as the N.F.L. has recognized by implementation of its shared revenue concept, is total infusion of consumer dollars into the sport, and some predictable and centrally administed allocation of those jointly earned revenues among member clubs. After that purpose, the members adopt the only workable model for earning and distributing the revenues from sale of a non-severable and indistinct product — professional football. See generally, Quirk, *An Economic Analysis of Team Movements in Professional Sports*, 38 Law & Contemporary Problems 42 (1973).

The product distributed by the member clubs is not analogous to ball bearings (*Timken Roller Bearing Co. v. U.S.*, 341 U.S. 593 (1951)), mattresses (*U.S. v. Sealy, Inc.*, 388 U.S. 350 (1967)), or groceries (*U.S. v. Topco Associates*, 405 596, 598 (1972)), because stripped of

the N.F.L. rules, participation in a regulated draft, orderly schedules and league standings, professional football is indistinguishable from sand lot follies. This inescapable fact of interdependence distinguishes the N.F.L. franchisees and professional football from other industries comprised of "separate business entities whose products have independent value" (519 F. Supp. at 584) banded together in *de facto* cartels. *C.f., Broadcast Music Inc., supra; Associated Press et al. v. United States*, 326 U.S. 1, 18 (1945) (Douglas, J., in concurring, notes that it is unclear whether the AP system would violate Sherman Act §1).

There was no evidence before the district court establishing that a member club of the N.F.L. could, or would seek to, defect to the U.S.F.L., thereby transferring its assets in quest of greater expolitation. Only such a showing, or an alternative theory, supported by evidence in the record could illustrate that any particular member club had an intrinsic value shorn of its affiliation with the N.F.L., and thus could support the district court's result. We find no such evidence in the record. *C.f. Associated Press, supra* (newspapers which sought to affiliate did not share revenues, and each produced separate and distinct products with intrinsic value). There is no evidence that any of the member clubs' investors would have committed time or capital investment without the existing league structure. Without the league, professional football becomes a pursuit no more substantial than a group of finely-tuned athletes traveling haphazardly about, in search of playing competition. *Accord, Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968).

Not only is it legally irrelevant that a second professional league has sprung up, since the U.S.F.L. did not exist at the time of trial, but since the two leagues' schedules do not overlap, one should not hypothesize as to any competitive relationship between the two, or the effect such inter-league competition would portend for

the validity of intra-league regulation. Thus, while I find issues of supposed competitive relations between the N.F.L. and U.S.F.L., or between existing and any new franchisees, intellectually interesting, I also dismiss any legal conclusions based upon these entities as speculative.

Holding that the N.F.L. is not a single entity, but rather an aggregation of economic competitors, is tantamount to ruling that the N.F.L. structure is itself *per se* invalid under the Sherman Act §1; this will spell the end of sporting leagues as are currently used in football, hockey, golf, soccer, basketball and countless other associations in industries with similar endemic characteristics. see *Board of Regent of the University of Oklahoma v. N.C.A.A.*, 707 F.2d 1147 (10th Cir. 1983) *cert. granted*, 52 U.S.L.W. 3308, Oct. 10, 1983.

To elevate formal corporate characteristics of ongoing economic entities above the substance of what purpose and function the structure serves, and what product(s) emerge from the process would not only destroy the N.F.L., professional sports leagues, and the goodwill that results from continuity in national allocation of the sport throughout the country, but would create a rule of law casting all franchise/wholesale distribution relationships into inescapable doubt.

Rather than avoid creating an "exemption" from the Sherman Act for professional sporting leagues, failing to account for the substantial and unique characteristics extant in professional sports by refusing the N.F.L. review as a single entity creates turmoil and dissolves the analytic framework within which courts scrutinize agreements under Sherman Act §1. It is unrealistic and inaccurate to lump intra-N.F.L. rules in with agreements binding separate economic entities which produce independent products and accrue independent revenues. See *Mid-South Grizzlies, supra; Levin, supra.* Rule 4.3 is no more a restraint on trade in professional football for Sherman Act §1 purposes, than is an intra-

corporate directive regulating the location or operation of its headquarters, franchise, or branch of a multi-outlet business. *See, e.g., Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

No "antitrust exemption" for the N.F.L. would be created by holding that it is a single economic entity for purposes of regulating franchise location. Section 2 of the Sherman Act, prohibiting monopolies and attempts to monopolize, remains fully applicable to all N.F.L. intra-league rules and activities. See *Mid-South Grizzlies, supra; c.f., Bowman v. N.F.L.*, 402 F. Supp. 754 (D. Minn. 1975) (challenge brought by former W.F.L. players to N.F.L. teams as an illegal boycott and unjustified exercise of monopoly power); *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972) (Sherman Act §2 applied to bar hockey reserve clause).

Many present N.F.L. practices, including Rule 4.3, are highly suspect under the Sherman Act §2 prohibitions, because notwithstanding the form or substance of the N.F.L.'s style of organization and operation, some practices appear calculated to create barriers to entry for would-be rival leagues in profitable geographical markets. In short, Sherman Act §2 is the proper curb upon the N.F.L.'s successful exploitation of its intra-firm economies of scale and competitive advantages. *Radovich v. N.F.L.*, 352 U.S. 445, 453-54 (1957) and particularly *American Football League v. N.F.L.*, 323 F.2d 124, 131 (4th Cir. 1963) suggest the possibility of true economic competitors challenging the effect of intra-league rules upon nascent competition under §2 of the Sherman Act.

The Raiders do not have standing to challenge Rule 4.3 under §2; as part and parcel of the entity they knowingly joined in 1967, they may have a cause of action in contract against the rest of the N.F.L. for failure of their expectations arising from their membership, but cannot challenge intra-league regulations, as could would-be

"upstream" suppliers or hopeful candidates for franchises like the Mid-South Grizzlies or the San Francisco Seals. See *San Francisco Seals v. National Hockey League*, 379 F. Supp. 966, 971-72 (C.D. Cal. 1974). The Coliseum may be able to mount a successful challenge to Rule 4.3 upon a §2 theory, but that issue is not presently before this Court.

As always, §1 remains a viable theory under which those "upstream" aspects of member clubs' operations — those activities which the N.F.L. and previous courts acknowledge the individual members as economically distinct entities — could be challenged. An oft-tried, and frequently successful example of this theory has been the player draft litigation; the distincition between instances in which the N.F.L. acts as a collective monitor of intra-league affairs, and those in which it intercedes at the behest of a member club for anti-competitive advantage over "upstream" bargaining entities outside the N.F.L.

The purposes for which the N.F.L. should be viewed as a single entity, impervious to §1 attack, must be functionally defined as those instances in which member clubs must coordinate intra-league policy and practice if the joint product is to result. *See, Broadcast Music Inc., supra; GTE Sylvania, supra.* Prohibiting the N.F.L. from attempting to exploit a monopolistic position in the industry, or from cloaking concerted anti-competitive pressure upon extrinsic "upstream" suppliers in the guise of "league" restrictions, does not require that we strike ancillary terms of the franchise agreements between member clubs as anti-competitive. A principled approach requires that we distinguish one situation from the other, and protect both competitive markets for football players and television coverage, as well as the integrity of terms Al Davis agreed to as salient aspects of his arms' length negotiations with the other member clubs. Davis has received no more or less than he has bargained for, as a franchisee of the N.F.L.

To hold the N.F.L. a single entity for purposes of intra-league regulation of relocation of existing franchises, thereby cutting off Sherman Act §1 liability in this instance, is fully consistent with the prior cases that address the validity of league regulation of member clubs. In such cases, the leagues' power has consistently been upheld. *See, e.g., A.F.L. v. N.F.L., supra; Mid-South Grizzlies, supra; San Francisco Seals, supra;* and *Levin, supra.*

I concur in the majority's opinion, insofar as it affirms the trial judge's denial of the appellants' motion for a change in venue. However, I would note the inappropriateness of applying the substantial body of case law dealing with racial bias in criminal venire to an instance where the strongest objections to the venue revolved around a highly attentuated financial or civic interest bestowed upon the jury by its deliberations concluding in favor of the L.A. Coliseum and Raiders. I would commend the trial judge for his extraordinary care in screening out prospective jurors who showed even a hint of bias, in maintaining an orderly proceeding despite the high degree of press coverage and histrionic advocacy by the parties, and in assuring deliberations in an informed and unemotive manner. As a result of his painstaking care, I find that the appellants received the verdict of six fair and untainted jurors.

CONCLUSION

Because the district court incorrectly determined that the N.F.L. member clubs are not engaged in a single enterprise for purposes of determining the location and marketing of professional football games between members, the jury verdict on the lawfulness of Rule 4.3 must not stand. Rule 4.3 cannot, as a matter of law, violate §1 of the Sherman Act. The judgment of the district court should be reversed and judgment entered for the N.F.L. and its co-defendants.

83
82-1470

No.

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FILED
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ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

THE MID-SOUTH GRIZZLIES
(A Joint Venture); et al.,
*Petitioners**

v.

THE NATIONAL FOOTBALL LEAGUE,
An Unincorporated Association; et al.,
*Respondents**

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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* Petitioners are:

The Mid-South Grizzlies (A Joint Venture); John Edward Bosacco; Mid-South Grizzlies (A Limited Partnership); and Consolidated Industries, Inc.

Respondents are:

The National Football League, An Unincorporated Association; Baltimore Football Club, Inc.; Buffalo Bills, Inc.; Chargers Football Company; Chicago Bears Football Club, Inc.; Cincinnati Bengals, Inc.; Cleveland Browns, Inc.; Dallas Cowboys Football Club, Inc.; Detroit Lions, Inc.; Five Smiths, Inc.; Green Bay Packers, Inc.; Houston Oilers, Inc.; Kansas City Chiefs Football Club, Inc.; Los Angeles Rams Football Company; Miami Dolphins, Ltd.; Minnesota Vikings Football Club, Inc.; New England Patriots Football Club, Inc.; New York Football Giants, Inc.; New York Jets Football Club, Inc.; New Orleans Saints Louisiana Partnership; Oakland Raiders, Ltd.; Philadelphia Eagles Football Club, Inc.; Pittsburgh Steelers Sports, Inc.; Pro-Football, Inc.; Rocky Mountain Empire Sports, Inc.; San Francisco Forty Niners; Seattle Professional Football, A General Partnership; St. Louis Football Cardinals Company; Tampa Bay Area NFL Football, Inc.; and Pete Rozelle.

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The MID-SOUTH GRIZZLIES (a Joint Venture); John Edward Bosacco; Mid-South Grizzlies (a Limited Partnership); and Consolidated Industries, Inc., Appellants

v.

The NATIONAL FOOTBALL LEAGUE, an unincorporated association; Baltimore Football Club, Inc.; Buffalo Bills, Inc.; Chargers Football Company; Chicago Bears Football Club, Inc.; Cincinnati Bengals, Inc.; Cleveland Browns, Inc.; Dallas Cowboys Football Club, Inc.; Detroit Lions, Inc.; Five Smiths, Inc.; Green Bay Packers, Inc.; Houston Oilers, Inc.; Kansas City Chiefs Football Club, Inc.; Los Angeles Rams Football Company; Miami Dolphins, Ltd.; Minnesota Vikings Football Club, Inc.; New England Patriots Football Club, Inc.; New York Football Giants, Inc.; New York Jets Football Club, Inc.; New Orleans Saints Louisiana Partnership; Oakland Raiders, Ltd.; Philadelphia Eagles Football Club, Inc.; Pittsburgh Steelers Sports, Inc.; Pro-Football, Inc.; Rocky Mountain Empire Sports, Inc.; San Francisco Forty Niners; Seattle Professional Football, A General Partnership; St. Louis Football Cardinals Company; Tampa Bay Area NFL Football, Inc. and Pete Rozelle.

No. 82-1793.

United States Court of Appeals,

Third Circuit.

Argued Sept. 13, 1983.

Decided Nov. 4, 1983.

Rehearing Denied Dec. 5, 1983.

Member of now defunct professional football league sued existing league, its members and commissioner complaining that refusal to grant application for membership in defendant league violated the antitrust laws. The United States District Court for the Eastern District of Pennsylvania, Joseph L. McGlynn, Jr., J., 550 F.Supp. 558, rendered summary judgment for defendants, and applicant appealed. The Court of Appeals, Gibbons, Cir-

cuit Judge, held that: (1) summary judgment motion was ripe for decision without additional discovery; (2) statute which insulated from antitrust liability merger of two competing professional football leagues, resulting in creation of defendant league, was not directed at preserving competition in the market for professional football and did not oblige existing league to permit entry by a particular applicant to its monopoly power; and (3) as regards Sherman Act claim, applicant failed to show any actual or potential injury to competition or that its admission would be contracompetitive.

Affirmed.

1. Federal Civil Procedure [KEY] **2553**

Where affidavits are filed setting forth specific reasons why movant's affidavits in support of summary judgment cannot be responded to and the facts are in possession of the movant, a continuance of the motion for discovery purposes should be granted almost as a matter of course. Fed.Rules Civ.Proc.Rule 56(f), 28 U.S.C.A.

2. Federal Civil Procedure [KEY] **1269**

Additional discovery on issue whether member teams of defendant professional football league were competitors was not warranted in antitrust action by rejected applicant for admission to league membership where not only did applicant fail to file required affidavit but its response to league's reply brief raised no more than a merely colorable claim that actual or potential competition for revenue other than from ticket sales and sales of television rights could be shown between a professional team based in applicant's hometown and other league members and adequate discovery had been had on agreed issue whether application was rejected on basis of objective criteria. Fed.Rules Civ.Proc.Rule 56(f), 28 U.S.C.A.; Sherman Anti-Trust Act, §§1, 2, 15 U.S.C.A. §§1, 2.

3. Monopolies [KEY] **12.(1.10)**

Under rule of reason analysis, a Sherman Act restraint of trade claim can be established by proof that defendants contracted, combined or conspired among themselves, that the combination or conspiracy produced adverse, anticompetitive effects within relevant product and geographic markets, that objects of and conduct pursuant to the contract or conspiracy were illegal and that plaintiff was injured as a proximate result of that conspiracy. Sherman Anti-Trust Act, §1, 15 U.S.C.A. §1; Clayton Act §4, 15 U.S.C.A. §15.

4. Monopolies [KEY] **28(7.3)**

For purpose of rule-of-reason analysis in Sherman Act challenge to professional football league's rejection of application for league membership by former member of now defunct competing football league it was irrelevant that when one member of present league, which was result of statute insulating merger of leagues from antitrust liablity, was seeking legislation concerning television revenue-sharing practices it admitted a new team in home state of chairman of committee considering the bill and that when the leagues were seeking statutory exemption permitting their merger a team was added in home state of powerful senator and congressman who supported the legislation and that postmerger addition of two other teams was prompted by desire to limit term of proposed legislation prohibiting home teams from blacking out televised games. Sherman Anti-Trust Act, §1, 15 U.S.C.A. §1; 15 U.S.C.A. §1291.

5. Monopolies [KEY] **12(6)**

Provision of 1966 legislation immunizing from antitrust liability merger of two or more football leagues into an expanded single league that "such agreement increases rather than decreases the number of professional football clubs so operating," could not reasonably be construed as addressing competition, and reference to increase in number of teams "so operating" was to

professional teams operating under antitrust exemption for television revenue sharing provided in 1961 statute and what 1966 statute suggested was that more home team territories would be added rather than to increase competition and statute permitted geographic enlargement of the resulting league's market power. 15 U.S.C.A. §§1291, 1294.

See publication Words and Phrases for other judicial constructions and definitions.

6. Monopolies [KEY] **12(6)**

The 1966 legislation permitting combination of members of two or more competing professional football leagues into one league did not obligate league which resulted from merger of two competing leagues to permit entry by any particular applicant to its shared market power and statute did not require the league to admit to membership an applicant from an area not presently served by existing league member. 15 U.S.C.A. §1294.

7. Monopolies [KEY] **28(1.4)**

Where member of defunct professional football team showed no actual or potential injury to competition from rejection of its application for franchise in existing professional football league which, by statute, had been granted monopoly power, the applicant could not succeed on Sherman Act claim of conspiracy to restrain trade, especially as applicant was not seeking recovery as a potential competitor outside the league but identified as the antitrust violation the league's negative vote on its application and statutory arrangement under which league functioned eliminated competition among its members and there was no showing that football teams located in applicant's territory and that of the nearest existing league member would complete for the same ticket purchases, etc. Sherman Anti-Trust Act, §1, 15 U.S.C.A. §1; 15 U.S.C.A. §1291.

8. Monopolies [KEY] **28(6)**

Regardless of whether members of existing professional football league, which had been granted statutory monopoly, competed in a so-called "raw material market" for players and coaching personnel, rejection of application for admission to league, an act charged as violating antitrust laws, did not restrain applicant from competing for players by forming competitive league and applicant failed to show how, if its exclusion reduced competition for team personnel, that reduction caused an injury to its business or property. Sherman Anti-Trust Act, §1, 15 U.S.C.A. §1; 15 U.S.C.A. §1291.

9. Monopolies [KEY] **12(1.6)**

The "essential facilities doctrine," as applied to Sherman Act challenge to rejection of application for admission to membership in professional football league having a statutory monopoly would result in additional competition in an economic rather than athletic sense and no recovery could be had on such theory where applicant failed to show how competition in any arguably relevant market would be improved if it were given a share of existing league's monopoly power. 15 U.S.C.A. §§1291, 1294; Sherman Anti-Trust Act, §1, 15 U.S.C.A. §1.

10. Monopolies [KEY] **12(b)**

Rejection of application by member of now defunct professional football league for admission to membership in existing league did not violate Sherman Act's prohibition on attempts to monopolize as not only did Congress authorize existing league's acquisition of its present market power by way of merger but rejected applicant failed to show that its admission would be contracompetive in any way and area in which it would operate had been left by existing league for potential competitors. 15 U.S.C.A. §§1291, 1294; Sherman Anti-Trust Act, §1, 15 U.S.C.A. §1.

Richard A. Sprague, Edward H. Rubenstone, Steve Alexander, Sprague & Rubenstone, Philadelphia, Pa., Gary Green (argued), Neil A. Morris, Sidkoff, Pincus, Greenberg & Green, Philadelphia, Pa., for appellants; Louis B. Schwartz, Philadelphia, Pa., of counsel.

Morris L. Weisberg, Blank, Rome, Comisky & McCauley, Philadelphia, Pa., James C. McKay, Paul J. Tagliabue (argued), Covington & Burling, Washington, D.C., for appellees.

Before SEITZ, Chief Judge, and GIBBONS and ROSENN, Circuit Judges.

OPINION OF THE COURT

GIBBONS, Circuit Judge.

Mid-South Grizzlies, a joint venture, and its members (the Grizzlies) appeal from a summary judgment in favor of the defendants in their suit against the National Football League (NFL), the league members, and League Commissioner Pete Rozelle, seeking damages under Section 4 of the Clayton Act, 15 U.S.C. §15 (1973). The suit concerns the defendants' refusal to grant the plaintiffs a football franchise. On appeal the Grizzlies contend that the district court erred: (1) in granting summary judgment while the Grizzlies' discovery requests were outstanding; and (2) in granting summary judgment when there were disputed issues of material fact.[1] We affirm.

I.

Background

The NFL is a not-for-profit business league, qualified for exemption from federal income tax under section 501(c)6 of the Internal Revenue Code, 26 U.S.C. §501(c)(6)(1967). The league has 28 members, each of

1. The court's decision is reported. *Mid-South Grizzlies v. National Football League*, 550 F.Supp. 558 (E.D.Pa. 1982).

which is an entity organized for profit, engaged in the business of fielding a professional football team. The NFL was formed by the merger of two predecessor football leagues. That merger took place following the enactment, in 1966, of Pub.L. 89-800, §6(b)(1), 80 Stat. 1515, which amended Pub.L. 87-331, §1, 75 Stat. 732 (1961), 15 U.S.C. §1291. Section 1291, enacted in 1961, granted to certain professional sports leagues a limited exemption from the antitrust laws with respect to the joint sale of television broadcast rights for league games, and the 1966 amendment permitted "a joint agreement by which the members of two or more football leagues combine their operations in expanded single leagues . . . if such agreement increases rather than decreases the number of professional football clubs so operating." The 1961 exemption with respect to joint sale of television broadcasting rights, intended to overrule the judgment in *United States v. National Football League*, 116 F.Supp. 319 (E.D.Pa.1953), does not "otherwise affect the applicability or nonapplicability of the antitrust laws" to any other activities of persons engaged in professional team sports. 15 U.S.C. §1294. The 1966 exemption does no more than permit the combination of members of two or more leagues into one.

Under the 1974 constitution and by-laws of the NFL each member obliges itself to operate a professional football club which is a member of the league. Each member has a designated "home territory" within which it has "the exclusive right . . . to exhibit professional football games played by teams of the League," and "[n]o club in the League shall be permitted to play games within the home territory of any other club unless a home club is a participant." Home territory is defined as a designated city and "the surrounding territory to the extent of 75 miles in every direction from the exterior corporate limits of such city."[2] Constitution and By-

2. There are special provisions for the New York and San Francisco Metropolitan areas and for Green Bay, Wisconsin.

Laws, Article IV, Appendix at 1129a, 1138a. The addition of a new league member within the home territory of any member requires unanimous consent of the league members. *Id.* Article 3.1(b). Elsewhere, applicants for membership may be admitted by the affirmative vote of not less than three-fourths or 20 members, whichever is greater. *Id.* Article 3.3(c). No league member may have a financial interest, direct or indirect, in any other league member. *Id.*, Article 9.1(B)(1).

The combined league began functioning in 1970 with 26 members. Thereafter new home territories were designated for Tampa, Florida, and Seattle, Washington, and member teams with franchises for those home territories began participating in league play in 1976. The uncontradicted affidavit of Commissioner Rozelle establishes that the initiative for establishing those franchises came from the NFL, which negotiated for a stadium location, determined methods of providing the franchise with players, and only then evaluated and selected owners. *See, e.g.*, Rozelle Deposition, Appendix at 1290a, 1431a-1440a.

As authorized by 15 U.S.C. §1291, the NFL has made a joint sale to three major television networks of the regular season and post-season television rights. Television revenues are divided equally among all members. Receipts from the sale of tickets are shared between the home team, 60% and the visiting team, 40%. Each home team retains other revenues, derived from its local operations.[3] On average, however, more than 70% of each team's revenue is derived from sources other than its operations at the home location. *See* Defendants' Motion for Summary Judgment, Affidavit of Pete Rozelle, Appendix at 188a.

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3. These include revenue from non-network coverage of preseason games, and revenue from food and beverage concessions, parking, and sale of team paraphernalia. Such revenue varies both with attendance and depending on the terms of stadium leases.

In 1974 and 1975 the Grizzlies participated in the World Football League from a home team location in Memphis, Tennessee. The members of that league could be found to have been competitors of the members of the NFL in the national market for network television revenue. The World Football League disbanded, however, halfway through the 1975 football season. The NFL had no franchise at Memphis, and a home team designation for that location would not infringe upon the home territory of any NFL member. Upon the demise of the World Football League the Grizzlies applied to the NFL for admission to the league with a designated home territory at Memphis.

At meetings with the NFL Expansion Committee, and with the full NFL membership, the Grizzlies urged that it had in place at Memphis an established, functioning professional football enterprise. The application was rejected. This lawsuit followed.

II.

The Complaint

The Grizzlies' complaint, filed on December 3, 1979, does not charge that the provisions of the NFL's Constitution and By-Laws reserving to its members franchise exclusivity for designated home territories violates the antitrust laws. Indeed, the Grizzlies sought such an exclusive franchise for themselves. Thus this case does not present any issue of possible antitrust violation from the exclusion of potential competitors in the designated exclusive home territories.

Nor do the Grizzlies complain that the NFL's 60-40 home team-visitor revenue sharing arrangement, which is not exempted from antitrust scrutiny by 15 U.S.C. §1291, caused any injury to their business or property. Indeed, the Grizzlies sought to participate in that arrangement. Moreover, the Grizzlies make no complaint about the operation of the NFL arrangements for joint

sale of television rights. They do not charge, for example, that the demise of the World Football League was caused by the NFL's television marketing practices. Nor do they charge that if they had been admitted those practices should have been changed. Rather, as with the 60-40 split of ticket sale revenue, they sought to participate.

Determining what the Grizzlies do not charge as antitrust violations is somewhat easier than determining what is charged. The complaint alleges that Memphis is a highly desirable submarket for major league professional football, that the refusal to consider it as a home territory for a franchise was made pursuant to an agreement or understanding or conspiracy among NFL members, the NFL and the Commissioner, that no valid basis for rejection of the Grizzlies was articulated for formulated by the defendants, and that the rejection amounted to an unreasonable restraint of trade, or a group boycott. One motive for that conspiracy is alleged to have been a desire to punish, intimidate and restrain plaintiffs from participation in major league professional football because they had entered into competition with NFL members by participating in the World Football League. The exclusion, so motivated, and having the effects alleged, is said to be a violation of Section 1 of the Sherman Act, and an attempt to monopolize interstate trade and commerce in professional football in violation of Section 2 of that Act.

III.

The Summary Judgment Record

The defendants moved for summary judgment on March 2, 1981, supporting their motion with affidavits by Commissioner Peter Rozelle and by Daniel M. Rooney, Chairman of the NFL Expansion Committee, to which defendants attached 12 supporting exhibits. At the time of the motion there was outstanding a motion by the Grizzlies to compel answers to certain

interrogatories, and to compel production of documents. In opposition to the summary judgment motion the Grizzlies filed an extensive brief addressing the merits, and the affidavits of William R. Tatham, I.B. Rowe and Steve Alexander, Esq. The Grizzlies contended that the summary judgment motion should not be considered until the completion of discovery.

On August 13, 1981 the trial court filed a memorandum and order declining to consider the motion for summary judgment until the completion of the Grizzlies' discovery, but restricted the scope of discovery to "matters relating to the NFL's decision not to grant the plaintiffs an NFL franchise at Memphis, Tennessee, and to the NFL's prior practices and standards with respect to the admission of new franchises into the league since the merger of the NFL and the American Football League." 4 App. at 894. The Grizzlies were permitted to depose Mr. Rozelle, Mr. Rooney, and the other members of the NFL Expansion Committee; but solely with respect to the designated subject matter. The order fixed a schedule for renewal of the motion for summary judgment, for filing opposition to it, and for briefing. *Id.* at 895.

On September 16, 1981 counsel for the Grizzlies wrote to the trial judge asking for clarification of the discovery order. The court was asked if the order was intended

> to focus the parties' attention . . . solely upon the issue of whether fair, objective, and articulated standards were applied by the defendants in passing upon plaintiffs' application for membership in the NFL, whether such standards existed at the time, and whether any substantive consideration, . . . was ever given to plaintiffs' application by the defendants.
>
> If, in fact, it was the Court's intention to focus only on the objective criteria question at this time, and to accept the remaining criteria in the plaintiffs'

> Complaint as true for the purpose of this motion proceeding, the scope of discovery can be substantially limited without waiving our position, many of the pending discovery requests can be withdrawn, subject to renewal . . . , and more specific discovery . . . can surely proceed. . . .

Letter of Edward H. Rubenstone, Esq. to Hon. Joseph L. McGlynn, Sept. 16, 1981, 4 App. at 1083-1084. The court replied two days later that "[y]our assumptions concerning the rationale underlying my order dated August 13, 1981 are correct." The court noted the Grizzlies' concession in open court on August 12, 1981 "that under some circumstances, and applying objective, rational and fair decisional criteria, defendants might legitimately, collectively refuse to deal with a potential competitor demanding entry into the professional football market place." The court explained further:

> In an effort to spare all parties the time and expense of what may prove to be unnecessary discovery proceedings, I entered my order of August 13th, which limited discovery "solely to matters relating to the NFL's decision not to grant the plaintiffs an NFL franchise at Memphis, Tennessee, and to the NFL's prior practices and standards with respect to the admission of new franchises into the league since the merger of the NFL and American Football League". If discovery in this discrete area should reveal that the NFL applied objective standards to the plaintiffs' application, there may not be a need to conduct further discovery.

4 App. at 1085. The trial judge also stated his assumption that there was no need to rule on outstanding discovery requests, since counsel's letter stated that he would be able to reach an accord with defense counsel regarding them. He warned, however, that all discovery must be complete by October 31, 1981, *Id.* at 1086. Fur-

ther correspondence between the parties and the court took place respecting the issues posed by the NFL's motion for summary judgment, and on December 17, 1981 the trial judge by letter reiterated his intention to consider the NFL motion "because if it is undisputed that the defendants used 'objective, rational and fair decisional criteria' in rejecting plaintiff's application, then that may well be the end of the litigation ball game." 4 App. at 1099.

On December 21, 1981 the defendants filed a renewed motion for summary judgment, relying on the pleadings, depositions, answers to interrogatories, admissions on file, and the Rozelle and Rooney affidavits accompanying their initial motion. 4 App. at 901. The brief in support of the renewed motion is not restricted to the question of whether the decision to reject the Grizzlies' application was based on "objective, rational and fair decisional criteria." Rather it relies on the "undisputed facts" in the record made to date with respect to the nature of the professional football business, and asserts that those facts warrant summary judgment for defendants as a matter of law. Thus the renewed motion put the Grizzlies on notice that the defendants were relying upon the summary judgment record as then comprised, and of the obligation to set forth in affidavits the reasons why additional discovery would be necessary in order to oppose it. Fed.R.Civ.P. 56(f).

On March 10, 1982 the Grizzlies filed a 107 page brief in opposition to the renewed motion for summary judgment. 4 App. at 963 et seq. That brief is not limited to the question whether the Grizzlies' application was rejected on the basis of objective rational and fair decisional criteria. It addresses the full range of issues discussed in the defendants' brief in support of the motion. Although the correspondence between counsel and the court was included in an appendix to the Grizzlies' brief, no affidavit was filed setting forth any reason why additional discovery should be afforded before the court ruled on the mo-

tion. Nor was that subject addressed in the brief in opposition to the renewed motion. It surfaced, however, in a Grizzlies' brief in response to defendant's reply brief. Responding to the defendants' contention that the members of the NFL are not competitors, but are engaged in a joint venture in the promotion of an entertainment spectacle, the Grizzlies argued:

> Nevertheless, despite Defendants' heavy reliance on this argument, the "single entity" issue was *not* the subject of discovery. Indeed, in order to determine whether there is any merit to Defendants' "single entity" contention, the starting point in discovery would be necessarily an examination of the business and financial records of the individual teams. These records would show what part of each team's revenue is not shared by any other team, what activities generated that revenue, and how the revenue was treated on the team's books. Based on these records, Plaintiffs could prove that the teams are not a "single entity."
>
> In addition, other factors or economic competition between the teams would have to be discovered, along with the views of each team about that economic competition. This would entail, (a) a study of the league's operations; (b) an inquiry into the existence of factionalism and voting blocks in league deliberations and at meetings; (c) depositions from representatives of each team; and discovery of a host of other categories of facts which need not be listed here. All of this information would be needed before the Court would have an adequate record on which to make a ruling on Defendants' contentions that the separate teams must be viewed as a single entity for antitrust purposes. It suffices to note that depositions were limited by Court Order to the four members of the 1973 NFL "Expansion Committee", and Pete Rozelle, and that the written

> discovery was confined to the issue of "objective standards". Perhaps it should be noted as well that before the Court entered its August 31, 1981 Order, Plaintiffs had, in fact, filed discovery requests seeking information which would have shed light on Defendants' "single entity" contention, but Defendants objected to all of this discovery. Therefore, the record does not contain evidence for the Court to rule on Defendants' "single entity" contention.

5 App. at 1217-18. This brief made no reference to specific discovery requests addressed to what the Grizzlies characterize as defendants' "single entity" contention. There is no suggestion that there are sources of revenue other than sales of tickets, sales of television rights, and revenues derived from food and beverage concessions, parking, and sales of team paraphernalia. There is no indication that a professional football business located at Memphis, Tennessee would compete with any NFL member for these peripheral sources of revenue. The Grizzlies do not contend that the league members (or the Grizzlies themselves if they were admitted to the league) compete for rather than share in network television and ticket sale revenues.

[1, 2] The trial court addressed the Grizzlies' unfocused contention that there should be additional discovery, noting:

> Plaintiffs have had more than sufficient discovery to fully develop their case. All of the outstanding requests to which defendants have refused to respond are not calculated to lead to relevant evidence necessary to resolving this matter. As a result I find that this case is now ripe for a decision on the merits.

550 F.Supp. at 565.

The Grizzlies contend that this ruling was error, because with additional discovery they could have discovered facts which would suggest the existence of actual

or potential competition between their Memphis based team and members of the NFL in some relevant product market.

Where Rule 56(f) affidavits have been filed, setting forth specific reasons why the moving party's affidavits in support of a motion for summary judgment cannot be responded to, and the facts are in the possession of the moving party, we have held that a continuance of the motion for purposes of discovery should be granted almost as a matter of course. *Costlow v. United States*, 552 F.2d 560, 564 (3d Cir.1977); *Ward v. United States*, 471 F.2d 667, 672 (3d Cir.1973). But as Judge Friedman so aptly observed:

> It is true that Rule 56(f) also authorizes the court in appropriate cases to refuse to enter summary judgment where the party opposing the motion shows a legitimate basis for his inability to present by affidavit the facts essential to justify his opposition, but to take advantage of this provision he must state by affidavit the reasons for his inability to do so and these reasons must be genuine and convincing to the court rather than merely colorable. It is not enough to rest upon the uncertainty which broods over all human affairs or to pose philosophic doubts regarding the conclusiveness of evidentiary facts. In the world of speculation such doubts have an honored place, but in the daily affairs of mankind and the intensely practical business of litigation they are put aside as conjectural.

Robin Construction Company v. United States, 345 F.2d 610, 614 (3d Cir.1965). Judge Friedman's observations are relevant here in two respects. First, the Grizzlies filed no Rule 56(f) affidavit.[4] Second, treating

4. Most courts which have considered the issue agree that filing an affidavit is necessary for the preservation of a Rule 56(f) contention that summary judgment should be delayed pending further discovery. *See, e.g., Gray v. Udevitz*, 656 F.2d 588 (10th Cir.1981);

their response to the defendants' reply brief as if it were such an affidavit, it raises no more than a merely colorable claim that actual or potential competition for revenue other than from ticket sales and sales of television rights could be shown between a professional team based in Memphis and the other members of the NFL. Just how speculative the Grizzlies' Rule 56(f) showing was, even assuming that it should be considered absent an affidavit, can be appreciated from the analysis, in the margin, of the outstanding discovery requests, the defendants' objections, and this court's conclusion as to their relevance to the issue of competition.[5]

NOTE — *(Continued)*

Thi-Hawaii v. First American Financial Corp., 627 F.2d 991 (9th Cir.1980); *Over the Road Drivers v. Transport Insurance Co.*, 637 F.2d 816 (1st Cir.1980); *British Airways Board v. Boeing Company*, 585 F.2d 946 (9th Cir.1978), *cert. denied*, 440 U.S. 981, 99 S.Ct. 1790, 60 L.Ed.2d 241 (1979); *Altemose Construction Company v. Building and Construction Trades Council of Philadelphia*, 443 F.Supp. 492, 498 (E.D.Pa.1977); *Mayerson v. Washington Mfg. Co.*, 58 F.R.D. 377 (E.D.Pa.1972). *But see Littlejohn v. Shell Oil Co.*, 483 F.2d 1140, 1146 (5th Cir.1973), *cert. denied*, 414 U.S. 1116, 94 S.Ct. 849, 38 L.Ed.2d 743 (1974) (continuance granted "[o]ut of an abundance of caution and to prevent a possible injustice" despite absence of affidavit); *Murrell v. Bennett*, 615 F.2d 306 (5th Cir.1980) (absence of affidavit excused in prisoner's pro se case).

5. Request	Appellees' Objection	Relevance to Competition Issue
I: #2—4, 6 All documents relating to formal meetings at which appellants' application was discussed.	Beyond Scope of issue	Irrelevant to competition issue — only relevant to "objective standards" issue.
I: #10 Informal meetings of NFL Expansion Committee and Sub-committee; dates, locations, subjects discussed.	Impossible to produce	Relevant to establishing motive for exclusion, not to competition.

Considering the already large record compiled prior to its consideration of the summary judgment record, the absence of a Rule 56(f) affidavit, the irrelevance of

NOTE — *(Continued)*

I: #8(d) All documents relating to possible transfer of NFL teams.	Irrelevant	Arguably relevant, but extremely broad and cumulative of materials in summary judgment record.
II: #5 Identify "specifically provisions in NFL Constitution and By-Laws governing voting procedures for making business decisions."	Contained in by-laws	Provisions are easily identified in summary judgment record.
I: 8(m) Identify all documents relating to the World Football League.	Involves enormous amounts of information. Not reasonably calculated to lead to admissible evidence.	Irrelevant to competition issue. Related only to the retaliation claim.
II: #3 Identify players and coaches in the WFL who subsequently joined the NFL.	Overly burdensome	Irrelevant to competition issue. Relates to retaliation and objective standards issues.
II: #4 State with specificity each administrative and promotional function performed by the NFL.	They are broadly stated in the by-laws. Specific functions are beyond enumeration.	Irrelevant to competition issue.
II: #7 State amounts of NFL assessments against individual members and expenditures against which such assessments were applied.	1) Unduly burdensome. 2) Might lead to disclosure of confidential information. 3) Not reasonably calculated to lead to discovery of admissible evidence.	Irrelevant to competition issue.

most of the pending discovery requests, and the conjectural nature of the Grizzlies' contentions as to the possibility of establishment of actual or potential competition

NOTE — *(Continued)*

II: #8(c),(d) Amount of disbursement of expansion fees from 1966 to present; amount of "assets" contributed to new franchises.	1) Unduly burdensome. 2) No bearing on issues of suit.	Irrelevant to competition issue.
II: #29-30 Specify how plaintiffs' expansion into the NFL would diminish the league's joint assets; identify all specific documents.	1) [General discussion of joint revenue producing assets of NFL: goodwill, League trademarks, etc.] 2) Exact diminution can't be forecast 3) Documents are confidential, burdensome to produce, not relevant.	Irrelevant to competition issue.
III: #1-7 Financial statements and tax returns of each defendant for 1976-1979: all documents revealing terms of operating agreements between defendants and NFL Properties, Inc.; all contracts by defendants or by NFL Properties, Inc. concerning broadcast rights and stadium leases.	1) Irrelevant. 2) Documents are confidential. Production not justified by any compelling necessity.	Plaintiffs advance five reasons for requesting these documents. See Motion to Compel, App. at 125a. Only one of these reasons is relevant: the financial data is relevant to plaintiffs' allegation that the defendants are engaged in conspiratorial, anti-competitive activities. However, the request is otherwise unnecessarily broad, and the information could be obtained in other ways.

in any arguably relevant market, we conclude that the court did not err in considering the motion for summary judgment on the present record.

IV.
The Merits

A. *Sherman Act Section 1*

Public Law 89-800 establishes as a matter of law that the merger which produced the NFL from two for-

NOTE — *(Continued)*

II: #6 State with particularity all facts relating to use of voting procedures in context of plaintiffs' application.	Information is in documents relating to plaintiffs' application.	Irrelevant to competition issue. Related to "Objective standards" issue.
II: #12 Identify all documents that relate to any interest or concern of defendant in locating or relocating a franchise in Mid-South/Memphis area.	NFL has already produced this.	Relevant, since this would establish element of competition between plaintiff and defendant for geographical market. But all that the plaintiffs ask for in their motion to compel is that the NFL deny the existence of any more documents under oath. This is not likely to lead to material facts. See Motion to Compel, App. at 108a.
II: #33 Whether any suits have been filed relating to the Tampa expansion.	Doesn't relate to appellants' application.	Irrelevant to competition issue. Goes to objective criteria question.
II: #34 Give all information relating to transfers of ownership interests from 1959 to present.	Beyond scope of suit.	Irrelevant to competition issue. Goes to objective criteria question.

merly competing leagues did not violate the antitrust laws. Public Law 87-331 establishes as a matter of law that the members may lawfully pool revenues from the sale of television rights. The parties agree that in other

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NOTE — *(Continued)*

IV: #1-9, 15-22 This set includes requests for all recent opinion polls and market surveys for each NFL team, all documents concerning correspondence between a member and a fan, season ticket holder mailing lists for 15 teams, all documents relating to trademark licensing, all documents relating to local broadcast rights, "any document concerning the identification . . . of a statistic regarding to number of players from any given team defendant who played in the Pro-Bowl . . .", etc.	". . . a 'fishing expedition' of the worst kind. . . ." Defendants' Objections to Plaintiffs' Requests for Production of Documents Set No. 4 at 3. [Not in appendix].	There may be documents in this request that would tend to suggest the possibility of competition for the Memphis home team market. However, the request is extraordinarily broad, and no showing was made that anything would be likely to impeach the provision in Art. 9.1(B)(1) of the Constitution and By-Laws of the NFL prohibiting a member club from having a financial interest, directly or indirectly, in any other league member.
V: #2,3,6,12,13 All documents relating to expansion decisions, including all documents relating to designation of Paul Brown as operator of the Cincinnati Bengals.	———	Irrelevant to competition issue.

respects a rule of reason analysis is appropriate.[6] The Grizzlies, moreover, make no contention that the 60-40 sharing of ticket sale revenue is an unreasonable restraint of trade.

[3] Under a rule of reason analysis a Section 1 violation and a right to recover under Section 4 of the Clayton Act can be established by proof:

> (1) that the defendants contracted, combined, or conspired among each other; (2) that the combination or conspiracy produced adverse, anticompetitive effects within relevant product and geographic markets; (3) that the objects of and conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiff was injured as a proximate result of that conspiracy.

Request	Appellees' Objection	Relevance to Competition Issue
VI: #2(a), (b), (c), 8, 13-15, 24 All minutes and notes of each participant at any meeting concerning expansion, labor unrest, antitrust problems, etc.; all studies of the college draft; all studies of effect of further expansion; all documents "reflecting any TV rating concerning any defendant . . .", all documents reflecting amount of gate receipts; stadium leases for each defendant between 1972 and 1979.	———	Irrelevant to competition issue.

6. In the complaint the Grizzlies alleged that their exclusion was the result of a group boycott, which was a per se violation of Section 1 of the Sherman Act. The per se violation contention is not made in this court.

Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 139, 147 (3d Cir. 1981), *cert denied*, 455 U.S. 1019, 102 S.Ct. 1715, 72 L.Ed.2d 137 (1982), quoting *Martin B. Glauser Dodge Co. v. Chrysler Corp.*, 570 F.2d 72, 81 (3d Cir. 1977), *cert. denied*, 436 U.S. 913, 98 S.Ct. 2253, 56 L.Ed.2d 413 (1978). In this case there is no dispute about the requisite concert of action among the defendants. The defendants do deny injury to competition in any relevant market from their rejection of the Grizzlies' application. They urge that any limitations on actual or potential competition in any relevant market were insulated from antitrust scrutiny by the 1961 and 1966 statutes referred to, or, are reasonable as a matter of law. They also urge that as a matter of law there was no competition among league members or between league members and non-members in other markets to which the Grizzlies point.

The Grizzlies identify as the relevant product market major-league professional football, and as the relevant geographic market the United States. The trial court found these markets to be relevant. 550 F.Supp. at 571 n. 33. The court observed as well that "[there is no doubt that the NFL currently has a monopoly in the United States in major league football." 550 F.Supp. at 571. The Grizzlies pose as the question on this appeal "whether it can be said as a matter of law that defendants neither acquired nor maintained monopoly power over any relevant market in an unlawful manner." Appellants' Brief at 27.

As to the acquisition of dominant position and monopoly power, the facts are undisputed. Long before the Grizzlies and the World Football League came into existence, Congress authorized the merger of the two major football leagues extant in 1966, and granted to the merged league the power to pool television revenues. That congressional decision conferred on the NFL the market power which it holds in the market for professional football. Congress could not have been unaware that necessary effect of the television revenue sharing scheme which it approved for the NFL would be that all members of that league would be strengthened in their ability to bid for the best available playing and coaching personnel, to the potential disadvantage of new entrants.

[4] In an effort to bolster its "unlawful acquisition of monopoly power" contention, however, the Grizzlies point to certain activities of the NFL and its predecessors which occurred prior to the 1966 legislation authorizing its formation. They point out that in 1961, when the old NFL was seeking legislation which would overrule *United States v. National Football League*, 116 F.Supp. 319 (E.D.Pa. 1953), which prohibited certain television revenue sharing practices, it admitted a new team in Minnesota, the home state of the Senate Majority Leader and Chairman of the Committee which considered the bill; that in 1966 when the old NFL and AFL leagues were seeking a statutory exemption which would permit their merger, a team was added in New Orleans, the home state of a powerful senator and powerful congressman who supported the legislation. Even the post merger addition of Seattle and Tampa Bay, according to the Grizzlies, was prompted by a desire to limit the term of proposed legislation prohibiting home teams from blacking out televised games when they were playing. See Pub.L. 93-107, §1, 87 Stat. 350, repealed by Pub.L. 93-107, §2, 87 Stat. 351 (1973). If these allegations are true, as we must assume for purposes of a summary judgment motion, they are, perhaps,

instructive on the nature of the federal legislative process. For purposes of rule of reason analysis, however, they are irrelevant. It would take a court bolder than this to claim that the congressionally authorized acquisition of market power, even market power amounting to monopoly power, was unlawful under Section 1 of the Sherman Act.

But, the Grizzlies urge, the 1966 statute did not confer the authority to abuse the market power, even though it may have authorized its acquisition. Rather, the merger was approved only "if such agreement increases rather than decreases the number of professional clubs so operating." 15 U.S.C. §1291. Paraphrasing their argument, it is the Grizzlies' contention that the statute which authorized NFL acquisition of monopoly power in the professional football market required not only that the league members refrain from abusing that power against potential competitors, but that it take affirmative steps to shre its market power with others.

This reading of the 1966 legislation is at least plausible. It poses two separate issues. One is the issue of abuse of monopoly power against potential rivals of the NFL in the business of promoting professional football as a spectator spectacle. The other is the issue of admitting others to a share in the NFL's dominant market position. Although the Grizzlies' briefs, both here and in the district court, tend to blur the distinction between those issues, the complaint makes clear that only the second is presented in this case. The only basis on which the Grizzlies seek recovery under Section 4 of the Clayton Act is that they were denied admission to the monopoly, and thus were deprived of a share of the NFL's monopoly power. No claim is made that abuse of NFL market power led to the demise of the World Football League, and no issue is before us concerning activities of the NFL, since that demise, which may have inhibited the development of competition by another football league. The NFL structure as a barrier to entry to the

market by another football league is relevant in this case only to the extent that it bears on the obligation to permit entry to the NFL.[7]

There are two possible sources of any NFL obligation to permit entry to its shared market power: the 1966 statute, and the Sherman Act. Each will be considered separately.

[5] The provision in the 1966 statute that "such agreement increases rather than decreases the number of professional football clubs so operating" cannot reasonably be construed as addressing competition, the preservation of which is the object of the Sherman Act. The basic thrust of the 1966 statute is to authorize an arrangement which eliminated competition among the only two viable competitors then in the professional football market. The reference to an increase in the number of professional football teams "so operating" is a reference to professional teams operating under the antitrust exemption for television revenue sharing provided in the 1961 statute. Thus what the 1966 statute suggests is that more home team territories would be added, not to increase competition in professional football, but to permit geographic enlargement of the NFL's market power.

The Grizzlies urge that home team regions derive important economic benefits from the presence of a professional football team, in the form of hotel, restaurant and travel business, stadium employment, and the like. Undoubtedly that is so, and probably such derivative economic benefits were in the minds of those Senators and Congressmen interested in NFL expansion. Those benefits, however, do not result from competition with the NFL or even from competition, other than athletic,

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7. There is no doubt that the NFL structure authorized by the 1961 and 1966 legislation in itself presents a formidable barrier to entry by a competitive football league. That legally countenanced barrier might well, if abused against extra-league competitors, result in anti-trust liability. But the issue of competition by another league is not presented here, except to the limited extent noted.

among its members. Rather they result from the presence of a franchisee which shares the NFL market power over professional football. Moreover, even if one assumes that Congress intended in the 1966 statute to extend incidental economic benefits on businesses in new home territory areas, it is difficult to see what standing the Grizzlies have to rely on that intent with respect to their claim for league membership. Finally, even if there was a congressional intent to confer economic benefits in some new home territories, nothing in the 1966 statute or its square legislation history suggests a basis for concluding that businesses in Memphis, Tennessee, rather than in other metropolitan areas were to receive them.

[6] Since the 1966 statute is not directed at preservation of competition in the market for professional football, and cannot be construed as conferring any economic benefit on the class to which the Grizzlies belong, we conclude that it does not oblige the NFL to permit entry by any particular applicant to the NFL shared market power.

We turn, therefore, to the Sherman Act. As noted above, Sherman Act liability requires an injury to competition. In this case the competition inquiry is a narrow one, because the Grizzlies are not seeking recovery as potential competitors *outside* the NFL. They identify as the antitrust violation the league's negative vote on their application for membership.

From affidavits, pleadings, and discovery materials which comprise the summary judgment record it could be found, and the trial court assumed, that the Grizzlies met all the qualifications for membership specified in the NFL Constitution and By-Laws. 550 F.Supp at 568. It is undisputed that in 1974 expansion teams were located at Tampa, Florida and at Seattle, Washington, raising to 28 the number of league competitors for the 1976 season. It is also undisputed that in deciding on expansion the NFL Expansion Committee considered a so-

cioeconomic study prepared for it by the Stanford Research Institute in December of 1978, which identified fourteen potential locations for new franchises, including Memphis[8] The Expansion Committee met with representatives of the Grizzlies, but made a negative recommendation on expansion, as of 1975, beyond 28 teams. The full membership of the league accepted the recommendation of the expansion committee.

The NFL's stated reasons for rejecting the Grizzlies' application included scheduling difficulties created by the presence of an odd number of teams, a long-running collective bargaining dispute with league players, several pending antitrust lawsuits, and league concern over legislation prohibiting television blackouts in home team territories, all of which allegedly made consideration of expansion unpropitious. The Grizzlies contend that there are material issues of disputed fact as to the accuracy of these reasons. They contend that at trial they could prove that the motivation for their rejection was to punish them for having attempted in the past to compete with the NFL in the World Football League, or to reserve the Memphis location for friends of present league team owners.

[7-9] Assuming, without deciding, that the summary judgment record presents disputed fact issues with respect to the actual motivation of the NFL members, those disputed facts are not material, under Section 1 of the Sherman Act, if the action complained of produced no injury to competition.

As to competition with NFL members in the professional football market, including the market for sale of television rights, the exclusion was patently pro-com-

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8. The other areas are Mexico City, Birmingham, Alabama, Seattle, Washington, Nassau County, New York, Anaheim, California, Chicago, Illinois, Phoenix, Arizona, Honolulu, Hawaii, Tampa, Florida, the Tidewater area of Virginia, Charlotte-Greensboro, North Carolina, Indianapolis, Indiana, and Orlando, Florida.

petitive, since it left the Memphis area, with a large stadium and a significant metropolitan area population, available as a site for another league's franchise, and it left the Grizzlies' organization as a potential competitor in such a league. If there was any injury to competiton, actual or potential, therefore, it must have been to intra-league competition.

The NFL defendants' position is that the summary judgment record establishes conclusively the absence of competition, actual or potential, among league members. Rather, they urge, the league is a single entity, a joint venture in the presentation of the professional football spectacle.

For the most part the congressionally authorized arrangements under which the NFL functions eliminate competition among the league members. Indeed it is undisputed that on average more than 70% of each member club's revenue is shared revenue derived from sources other than operations at its home location. The Grizzlies do not challenge the legality of the NFL's revenue sharing arrangements, and seek to participate in them. The Grizzlies emphasize that there nevertheless remains a not insignificant amount of intra-league non-athletic competition. We need not, in order to affirm the summary judgment, accept entirely the NFL's position that there is no intra-league competition. Conceivably within certain geographic submarkets two league members compete with one another for ticket buyers, for local broadcast revenue, and for sale of the concession items like food and beverages and team paraphernalia.[9] Thus rejection of a franchise application in the New York metropolitan area, for example, might require a different antitrust analysis than is suggested by this record. But the Grizzlies were obliged, when faced with the NFL de-

9. Thus we need not, in order to affirm, approve the suggestion in *Levin v. National Basketball Ass'n.*, 385 F.Supp. 149, 152 (S.D.N.Y.1974), that there can never be competition among league members.

nial of the existence of competition among NFL members and a potential franchisee at Memphis, to show some more than minimal level of potential competition, in the product markets in which league members might compete. They made no such showing. The record establishes that the NFL franchise nearest to Memphis is at St. Louis, Mo., over 280 miles away. There is no record evidence that professional football teams located in Memphis and in St. Louis would compete for the same ticket purchasers, for the same local broadcast outlets, in the sale of team paraphernalia, or in any other manner.

The Grizzlies contend on appeal, although they did not so contend in the trial court, that league members compete in what they call the "raw material market" for players and coaching personnel. Entirely apart from the propriety of considering a legal theory not presented in the trial court,[10] there are major defects in this Grizzlies' argument. First, the Grizzlies exclusion from the league in no way restrained them from competing for players by forming a competitive league. Second, they fail to explain how, if their exclusion from the league reduced competition for team personnel, that reduction caused an injury to the Grizzlies' business or property. See *Van Dyk Research Corp. v. Zerox Corp.*, 631 F.2d 251, 255 (3d Cir. 1980), *cert. denied*, 452 U.S. 905, 101 S.Ct. 3029, 69 L.Ed.2d 405 (1981). (Section 4 plaintiff has burden of proving that injury was caused by illegality relied on).

One final Grizzlies' argument in support of their section 1 Sherman Act claim bears mentioning. Relying on the essential facilities doctrine developed in cases

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10. *See Halderman v. Pennhurst State School & Hospital*, 673 F.2d 628, 639 (3d Cir.) (in banc), *cert. granted*, 457 U.S. 1131, 102 S.Ct. 2956, 73 L.Ed.2d 1348 (1982); *Caisson Corp. v. Ingersoll Rand Co.*, 622 F.2d 672, 680 (3d Cir. 1980); *Teen-Ed, Inc. v. Kimball International, Inc.*, 620 F.2d 399, 401 (3d Cir. 1980); *Toyota Industrial Trucks U.S.A., Inc. v. Citizens Nat'l Bank of Evans City*, 611 F.2d 465 (3d Cir. 1979).

such as *Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963); *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945), and *Gamco, Inc. v. Providence Fruit & Produce Bldg.*, 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817, 73 S.Ct. 11, 97 L.Ed. 636 (1952), they urge that because the NFL is a practical monopoly it had an obligation to admit members on fair, reasonable, and equal terms, absent some procompetitive justification for their exclusion. This Grizzlies argument suffers from the same defect as the others. The essential facilities doctrine is predicated on the assumption that admission of the excluded applicant would result in additional competition, in an economic rather than athletic sense. The Grizzlies have simply failed to show how competition in any arguably relevant market would be improved if they were given a share of the NFL's monopoly power.

Since on the record before us the Grizzlies have shown no actual or potential injury to competition resulting from the rejection of their application for an NFL franchise, they cannot succeed on their section 1 Sherman Act claim.

B. *Sherman Act Section* 2.

The Grizzlies also plead a violation of Section 2 of the Sherman Act, 15 U.S.C. §2 (1973). That section prohibits attempts to monopolize. In section 2 cases the alleged monopolist is prohibited from acting "in an unreasonably exclusionary manner vis-a-vis rivals or potential rivals. . . ." *Byars v. Bluff City News Co., Inc.*, 609 F.2d 843, 853 (6th Cir. 1979). *See also Official Airline Guides, Inc. v. FTC*, 630 F.2d 920, 926-28 (2d Cir. 1980), *cert. denied*, 450 U.S. 917, 101 S.Ct. 1962, 67 L.Ed.2d 343 (1981) (Federal Trade Commission Act §5 claim); *Mid Texas Communications v. American Telephone & Telegraph Co.*, 615 F.2d 1372, 1387 (5th Cir. 1980), *cert. denied*, 449 U.S. 912, 101 S.Ct. 286, 66 L.Ed.2d 140 (1981).

[10] Our analysis of the section 1 Sherman Act claim applies equally to the Grizzlies' section 2 claim. Congress by legislation in 1961 and 1966 authorized the NFL acquisition of the market power which it holds, and the Grizzlies cannot challenge that acquisition. The only action they complain of is their exclusion from the shared monopoly, but they have failed to show that their admission would be contra-competitive in any way. Indeed the Memphis home team market has been left by the NFL for potential competitors. Thus on this record summary judgment on the section 2 Sherman Act claim was also proper.

Conclusion

The court did not err in considering the defendants' summary judgment motion on the present record. There are no disputed fact issues material to the legal issues presented. The trial court did not err in applying the Sherman Act. Thus the judgment appealed from will be affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MID-SOUTH GRIZZLIES, et al.	:	CIVIL ACTION
v.	:	
NATIONAL FOOTBALL LEAGUE, et al.	:	No. 79-4373

ORDER

AND NOW, this 5 day of NOVEMBER, 1982, upon consideration of Defendants' Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, it is hereby

ORDERED

that the motion is GRANTED and judgment is entered in favor of the defendants and against the plaintiffs.

BY THE COURT

JOSEPH L. McGLYNN, Jr. *J.*

MID-SOUTH GRIZZLIES, et al.
v.
NATIONAL FOOTBALL LEAGUE, et. al.
Civ. A. No. 79-4373.
United States District Court,
E.D. Pennsylvania,
Civil Division.
Nov. 5, 1982.

Unsuccessful applicants for a National Football League franchise for the Memphis, Tennessee area brought Sherman Act suit against the League. The League moved for summary judgment. The District Court, McGlynn, J., held that: (1) rule-of-reason test applied; (2) neither essential-facility doctrine nor the trade association cases were applicable; (3) a Section 1 violation had not been made out; and (4) although the League currently has a monopoly in the United States in major league football it had not used that power to prevent formation of the rival league or fielding of a team in Memphis.

Motion granted.

1. Federal Civil Procedure [KEY] **2543**

Summary judgment is a drastic remedy and a court must resolve all doubts as to existence of genuine issues of fact against the movant and must view all inferences from the facts in the light most favorable to the opposing party. Fed.Rules Civ.Proc. Rules 56, 56(c), 28 U.S.C.A.

2. Federal Civil Procedure [KEY] **2484**

Summary judgment should be used sparingly in antitrust cases. Sherman Anti-Trust Act, §§1, 2, 15 U.S.C.A. §§1, 2; Fed.Rules Civ.Proc. Rules 56, 56(c), 28 U.S.C.A.

3. Federal Civil Procedure [KEY] **2484**

Although a party's right to trial should be carefully guarded, filing of an antitrust complaint cannot insure a right to trial, i.e., defeat a summary judgment motion,

absent any significant probative evidence supporting the party's claims and such a party should not be permitted to proceed to trial in the hope of developing evidence to support his claims. Sherman Anti-Trust Act, §§1, 2, 15 U.S.C.A. §§1, 2; Fed.Rules Civ. Proc. Rules 56, 56(c), 28 U.S.C.A.

4. Federal Civil Procedure [KEY] **2484**

Summary disposition of antitrust cases is proper even when employing the rule of reason. Sherman Anti-Trust Act, §§1, 2, 15 U.S.C.A. §§1, 2; Fed.Rules Civ. Proc. Rules 56, 56(c), 28 U.S.C.A.

5. Federal Civil Procedure [KEY] **1267**

District court has discretion in controlling the discovery process.

6. Federal Civil Procedure [KEY] **1272**

Where appropriate, a district court may limit a party's discovery as long as he is able to fully develop his case.

7. Monopolies [KEY] **12(6)**

Unlike professional baseball, professional football is not totally exempt from the antitrust laws and in two areas only does football escape the antitrust laws' watchful eye: joint agreement concerning the telecasting of games and the 1966 merger of the AFL with the NFL. Sherman Anti-Trust Act, §§1, 2, 15 U.S.C.A. §§1, 2; 15 U.S.C.A. §§1291–1295.

8. Monopolies [KEY] **12(1.2)**

Not all group decisions refusing to do business with someone should be measured against the strict per se criteria and per se violations should be found only where the involved agreements are so clearly anticompetitive and lacking in any redeeming quality that they can be conclusively presumed illegal without further inquiry. Sherman Anti-Trust Act, §§1, 2, 15 U.S.C.A. §§1, 2.

9. Monopolies [KEY] **12(6)**

Because of the unique character of professional sports courts have rejected the per se test and have routinely applied the Rule of Reason in deciding antitrust suits concerning league practices. Sherman Anti-Trust Act, §§1, 2, 15 U.S.C.A. §§1, 2.

10. Monopolies [KEY] **12(1.10)**

The "Rule of Reason test" mandates that a court determine whether the restraint imposed merely regulates and thereby promotes competition or is one that may suppress or destroy competition. Sherman Anti-Trust Act, §§1, 2, 15 U.S.C.A. §§1, 2.

See publication Words and Phrases for other judicial construction and definitions.

11. Monopolies [KEY] **12(1.10)**

Crucial to proving an antitrust violation under the rule-of-reason test is a showing of anticompetitive intent or effect. Sherman Anti-Trust Act, §§1, 2, 15 U.S.C.A. §§1, 2.

12. Monopolies [KEY] **28(8)**

Even where state of mind is material in an antitrust case, there must be some demonstration that there is a sufficient quantum of evidence to permit a party to go to the jury. Sherman Anti-Trust Act, §§1, 2, 15 U.S.C.A. §§1, 2.

13. Monopolies [KEY] **12(1.2)**

The essential-facility doctrine is applicable in an antitrust case only where a party is being denied access to something necessary for that party to engage in business which is controlled by his competitors. Sherman Anti-Trust Act, §§1, 2, 15 U.S.C.A. §§1, 2.

14. Monopolies [KEY] **12(6)**

The essential-facility doctrine was not applicable in antitrust suit challenging professional football league's refusal to accept application for a new franchise. Sherman Anti-Trust Act, §§1, 2, 15 U.S.C.A. §§1, 2.

15. Federal Civil Procedure [KEY] **2542**

Judicial notice may be used in resolving a motion for summary judgment. Fed.Rules Civ.Proc. Rules 56, 56(c), 28 U.S.C.A.

16. Monopolies [KEY] **12(18)**

Because the potential harm to outsiders is so great when their competitors are brought together through a trade association the law requires access to the group be available to anyone who meets fair criteria. Sherman Anti-Trust Act, §§1, 2, 15 U.S.C.A. §§1, 2.

17. Monopolies [KEY] **12(6)**

Trade association antitrust cases were inappropriate in determining antitrust violation by refusal of professional football league to accept franchise application in that production of professional sports necessarily requires joint planning and decision making and unlike normal business competitors the teams are interdependent and while economic success of one team does not necessarily mean the success of another member the stability which is derived from membership in a league produces a better product which is to the benefit of the public at large and the teams do not compete in the same manner as the independent businesses in the trade association. Sherman Anti-Trust Act, §§1, 2, 15 U.S.C.A. §§1, 2.

18. Monopolies [KEY] **12(6)**

Refusal of professional football league to grant franchise for the Memphis, Tennessee area did not constitute unreasonable restraint of trade in violation of Sherman Act. Sherman Anti-Trust Act, §1, 15 U.S.C.A. §1.

19. Monopolies [KEY] **12(1.3)**

Possession of monopoly power in a relevant market alone is not enough to establish an antitrust violation. Sherman Anti-Trust Act, §2, 15 U.S.C.A. §2

20. Monopolies [KEY] **12(1.3)**

Antitrust laws were not intented to punish a business that has become a monopoly because of a superior product, business acumen or historic accident but the law does require that a monopoly not abuse its power and where business possessing monopoly power wilfully acquires or maintains such power it will incur a penalty. Sherman Anti-Trust Act, §2, 15 U.S.C.A §2.

21. Monopolies [KEY] **12(1.2)**

To avoid a Sherman Act violation, a monopoly must refrain at all times from conduct directed at smothering competition and, put another way, a monopoly abuses its power when it behaves in an unreasonably exclusionary mannor vis-a-vis rivals or potential rivals.

22. Monopolies [KEY] **12(6)**

Although National Football League currently has a monopoly in the United States in major league football, its refusal to accept application for franchise for Memphis, Tennessee area did not violate Sherman Act as franchise applicants were still free to promote a rival league and NFL's actions did not prevent formation of the rival league or the feilding of a team in Memphis. Sherman Anti-Trust Act, §2, 15 U.S.C.A §2.

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Edwin P. Rome, Morris L. Weisberg, Blank, Rome, Comisky & McCauley, Philadelphia, Pa., Hamilton Carothers, James C. McKay, Washington, D.C., for defendants.

MEMORANDUM OF DECISION

McGLYNN, District Judge.

Pending before the court is Defendants' Motion for Summary Judgment. Although the submissions regarding the motion are voluminous, they in essence address one issue: does a professional sport league's refusal to accept for membership a qualified applicant for a franchise in an area where no current league team is located violate Sections 1 or 2 of the Sherman Act? Based on the undisputed material facts and the reasons set forth below, I believe not. Therefore, Defendants' Motion for Summary Judgment is granted.

The Team Rosters

The offensive team (plaintiffs) is the Mid-South Grizzlies, a joint venture established on November 1, 1975 consisting of the Mid-South Grizzlies, a Tennessee limited partnership,[1] Consolidated Industries, Inc., a California corporation, and John Edward Bosacco, an individual. The defensive lineup (defendants) is composed of the National Football League ("NFL"), the twenty-eight individual NFL football teams, and calling the signals, Pete Rozelle, the NFL Commisioner.

Plaintiffs' Game Plan

In the fall of 1975, plaintiffs applied to the NFL in the hope of obtaining a franchise for the Memphis, Tennessee area. Along with their application, they submitted an application fee as required by the NFL Constitution and By-Laws. This fee was returned to the plaintiffs a few weeks later. In December 1975, plaintiffs met with the NFL Expansion Committee. This committee was responsible for the investigation and planning for the addition of new NFL teams. Its members at the time of plaintiffs' application were Daniel M. Rooney, President of the Pittsburgh Steelers, Gerald H. Phipps of the Denver

1. The partnership's Chief Executive Officer is John F. Bassett.

Broncos, Louis Spadia of the San Francisco '49ers and Texas Schramm of the Dallas Cowboys. At this meeting plaintiffs were told that further expansion of the NFL at that time was in their opinion unwise and that they would recommend to the full NFL membership that no further expansion be considered for the moment.

Plaintiffs met with defendants on at least two more occasions. One of these meetings was with the entire NFL membership. A few months after their presentation to the full membership, the NFL passed on March 17, 1976 the following resolution:

> RESOLVED, after thorough review of the major problems presently confronting the NFL, that the member clubs do not believe they can formally commit to specific expansion arrangements at this time. The clubs do, however, reaffirm their desire to bring total League membership to thirty teams as soon as possible after resolution of current problems and assimilation of the new Tampa Bay and Seattle teams. At that time, Memphis and Birmingham, which have most actively sought admission in recent months, will be among the cities receiving strongest consideration for NFL franchises.

The problems referred to in the resolution were many. Around the time of plaintiffs' application, no collective bargaining agreement with the Players Association had been in effect for two seasons. In addition a district court in California had held several player restrictions to be unlawful.[2] A few months later another district court in California enjoined application of the "Rozelle rule" by the NFL. Pending in a third district

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2. The court found the "Rozelle rule," the "draft rule," the "one-man rule" and the "tampering rule" violative of the Sherman Act. *Kapp v. National Football League*, 390 F.Supp. 73 (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907, 99 S.Ct. 1996, 60 L.Ed.2d 375 (1979).

court was a case attacking the NFL college draft.[3] Near the end of 1975, another district court found the "Rozelle rule" unlawful.[4] Also during this time period efforts were afoot to make permanent legislation which prevented the practice of blacking out television coverage of sold out home games in the area surrounding the home team's stadium. In addition, the NFL Players Association threatened to challenge the procedures the NFL implemented to man the new Tampa Bay and Seattle teams.[5] The players filed suit in March 1976.[6]

Because defendants had already decided expansion anywhere at the time of plaintiffs' application was not prudent, they never fully considered plaintiffs' application on the merits.[7] Defendants did, however, tell plain-

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3. *Smith v. Pro-Football, Inc.*, 420 F.Supp. 738 (D.D.C.1976), *aff'd in part and rev'd in part*, 593 F.2d 1173 (D.C.Cir.1978).

4. *Mackey v. National Football League*, 407 F.Supp. 1000 (D.Minn.1975), *aff'd in part and rev'd in part*, 543 F.2d 606 (8th Cir.1976), *cert. dismissed*, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977).

5. These franchises were awarded in 1974. They did not begin actual play, however, until 1976. In order to man these new teams, each one was permitted to draft up to three men from each existing team except a minimum of thirty-two men placed on a protected list. They were also given preferential selection rights in the NFL college draft. Exhibit 4F to Rooney Affidavit, Motion of Defendants for Summary Judgment and Addenda.

6. The NFL's litigation problems have continued. Recently, the Second Circuit affirmed a district court's finding that the NFL cross ownership ban preventing NFL owners from owning any other major professional sports team violated the Sherman Act. *North American Soccer League v. National Football League*, 670 F.2d 1249 (2d Cir.1982), *cert. denied*, __ U.S. __, 103 S.Ct 499 (1982). In May 1982, the NFL also lost a fight to prevent the owner of the Oakland Raiders from moving his team to the Los Angeles area. *Los Angeles Memorial Coliseum Commission v. National Football League*, Civ. No. 78-3523-HP (C.D.Cal.). And of serious consequence to the owners, players' strike which began in September 1982.

7. As a result of this lawsuit, defendants have since examined the merits of plaintiffs' application and have found it, in their eyes,

tiffs they would receive serious consideration in the future when definite expansion plans were formulated.

Plaintiffs finally filed this lawsuit in December 1979. In their Complaint, plaintiffs allege that part of defendants' motive in rejecting plaintiffs' application was to retaliate against plaintiffs for their past involvement in the now defunct rival of the NFL, the World Football League ("WFL").[8] The WFL was formed in 1973 and played games in the entire 1974 football season and in the 1975 season until October 1975. Several of its teams had competed directly with NFL teams for fan support and revenue.

In any event plaintiffs assert that defendants' actions constitute an unlawful group boycott and an unreasonable restraint of trade in violation of Section 1 of the Sherman Act.[9] Moreover, they allege that defendants' behavior constitutes monopolization violative of Section 2 of the Sherman Act.[10]

The Defensive Strategy

Defendants respond with several defenses. First they deny their actions were motivated by animus towards plaintiffs because of their WFL involvement. De-

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NOTE — *(Continued)*

wanting. Because I am assuming plaintiffs were qualified for a franchise in deciding this motion, I make no finding regarding this particular contention of defendants.

8. Mr. Bosacco owned and operated the Philadelphia Bell; the limited partnership owned and operated the Memphis Southmen, also known as the Memphis Grizzlies; and Consolidated owned and operated the Portland Storm.

9. Section 1 reads in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, . . . is declared to be illegal. . . ."

10. Section 2 provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, . . . shall be deemed guilty of a felony. . . ."

fendants also contend that their behavior was neither a group boycott nor an unreasonable restraint of trade. In addition they assert there was no contract, combination or conspiracy as required by Section 1 because the NFL, in this case, acted as a single entity. Moreover, they assert they have performed no act of monopolization proscribed by Section 2. Lastly, they contend that plaintiffs Bosacco, Consolidated and the joint venture are not real parties in interest and thus lack standing to sue. Because I find that defendants' conduct is neither an unlawful group boycott, an unreasonable restraint of trade nor an act of monopolization, I will not make a call on defendants' remaining contentions.[11]

The Pregame Show

The NFL is well known to any football fan. It is an unincorporated association comprised of twenty-eight teams located throughout the United States. All but one team are privately owned and operated. Although these teams "compete" with one another on the playing field and for the top players, they act jointly in many aspects of their enterprise as the term league necessarily implies. For example, they set rules for the games, schedule contests, provide for joint marketing of national broadcast rights and, of importance here, decide the locations and owners of new franchises.[12] The rules which govern the awarding of new franchises are contained in the NFL's Constitution and By-Laws.[13]

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11. The Second Circuit on facts different from this case recently rejected the single entity theory in *North American Soccer League v. National Football League*, 670 F.2d 1249 (2d Cir. 1982), *cert. denied*, __ U.S. __, 103 S.Ct. 499 (1982).

12. An award of a new franchise requires three-quarters approval of the then existing franchises. Constitution and By-Laws for the National Football League for 1975, ¶3.3(C).

13. The Constitution and By-Laws for the National Football League at the time of plaintiffs' application contained the following provisions governing the awarding of a franchise:

Each team derives a great deal of its revenue through jointly generated income. For example, money resulting from national broadcasting contracts is shared among league members on agreed upon formulae. Other revenue, such as the sale of team paraphernalia and local

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NOTE — *(Continued)*

3.1(a) Membership in the League shall be limited to the twenty six (26) member clubs specified in Section 4.3(A) hereof and such new members as may be thereafter duly elected.

(b) The admission of a new member within the home territory of a club is prohibited unless approved by the unanimous consent of all members of the League.

3.2 Any person, association, partnership, corporation, or other entity of good repute organized for the purpose of operating a professional football club shall be eligible for membership except:

(a) No corporation, association, partnership or other entity not operated for profit nor any charitable organization or entity not presently a member of the League shall be eligible for membership.

3.3(A) Each applicant for membership shall make a written application to the Commissioner. Such application shall describe the type of organization and shall designate the city in which the franchise of the applicant shall be located; such application shall further describe and contain the following information:

(1) The names and addresses of all persons who do or shall own any interest or stock in the applicant, together with a statement that such persons will not own or hold such interest or stock for the benefit of any undisclosed person or organization.

(2) A detailed balance sheet of such company as of the date of organization and a pro forma statement as of the time it shall commence actual operation. A written financial statement shall be required from the applicant and from anyone owning an interest in any applicant, including stockholders and partners.

(3) If applicant is a corporation, a certified copy of the Articles of Incorporation, By-Laws and share certificate shall accompany such application provided, however, if the organization of such corporation has not been commenced or completed a detailed statement summarizing the proposed plan of operation and the capital structure thereof shall be furnished.

advertising, is individually generated and not shared with other NFL members.

The NFL has its roots early in this century. Throughout the years several other leagues appeared usually only for a short time and without much success. One entry, however, did succeed. In the early 1960's the American Football League ("AFL") was formed with eight teams. The two leagues were run separately until 1966 when the two agreed to a merger to be fully imple-

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NOTE — *(Continued)*

(4) If applicant is partnership [sic], unincorporated association or other entity, certified copy of the Articles of Co-Partnership or organization government agreement shall accompany such application.

(5) The names and addresses of all officers and directors.

(6) All applications shall contain a representation that upon acceptance, the applicant will subscribe to and agree to be bound by the Constitution, By-Laws, Rules and Regulations of the League and any amendments or modifications thereof.

(B) Each application for membership shall be accompanied by a certified check for Twenty-Five Thousand Dollars ($25,000.00). Upon approval of any application for membership, an additional Twenty-Five Thousand Dollars ($25,000.00) shall be paid to the League. If any application for admission is rejected, the League shall repay to the applicant the sum of Twenty-Five Thousand Dollars ($25,000.00) paid by the applicant at the time of such application, less all expenses reasonably incurred in connection with the consideration and investigation of such application.

(C) Upon receipt of any application for membership in the League, the Commissioner shall conduct such investigation thereof as he deems appropriate. Following the completion of such investigation, the Commissioner shall submit the application to the members for approval together with his recommendation thereon, and such information thereon that the Commissioner deems pertinent. Each proposed owner or holder of any interest in a membership, including stockholders in any corporation, members of a partnership and all other persons holding any interest in the applicant must be individually approved by the affirmative vote of not less than three-fourths or 20, whichever is greater, of the members of the League.

mented by 1970.[14] At the time they entered the merger agreement, the NFL had fifteen teams and the AFL had nine.

Expansion beyond these twenty-four teams has been sporadic. In 1967, the NFL awarded a franchise to New Orleans. A year later, the AFL added Cincinnati. By the time the merger was completed, the NFL consisted of twenty-six teams and stayed at that number for several years. In 1974, a year before plaintiffs' application, plans were made to add to two more franchises in Tampa Bay and Seattle. These two teams first became active in 1976, shortly after plaintiffs' application. Each new team was manned by taking a maximum of three players from each previously established team. No new NFL franchise has been awarded to anyone since the time of plaintiffs' application. Although the NFL does expect to award two more franchises in the foreseeable future, they have not decided when, where or to whom.

No current NFL franchise operates in the Memphis area. The closest NFL team location is St. Louis, Missouri which is two hundred and eighty-one miles from Memphis.[15]

The Rules of the Game

[1] Rule 56 of the Federal Rules of Civil Procedure authorizes a district court to enter summary judgment where "the peladings, depositions, answers to interrogatories, and the admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact." Fed.R.Civ.P. 56(c). Only those facts which "tend to prove or disprove elements of the disputed claim for relief" need be examined before a de-

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14. Congress exempted the merger from the antitrust laws. Pub.L. No. 89-800, 80 Stat. 1515 (codified at 15 U.S.C. §1291 (1976)).

15. Mileage was provided by the American Automobile Association.

cision is rendered. *Chuy v. Philadelphia Eagles*, 407 F.Supp. 717, 723 n. 9 (E.D.Pa. 1976), *citing McCormick on Evidence* §185, at 434-35 (2d ed. E. Cleary 1972). The court must recognize, however, that summary judgment is a drastic remedy, resolve all doubts as to the existence of genuine issues of fact against the moving party, and view all inferences from the facts in the light most favorable to the parties opposing the motion. *Continental Insurance Co. v. Bodie*, 682 F.2d 436 (3d Cir. 1982).

[2-4] The Supreme Court has cautioned that summary judgment should be used sparingly in antitrust cases. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962). However as my former colleague then District Judge, now Circuit Judge, Becker noted, a legion of cases granting either partial or total summary judgment in antitrust cases have been upheld by the Supreme Court and the Third Circuit since Poller.[16] *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 513 F.Supp. 1100, 1140 & n. 53 (E.D.Pa. 1981), *appeal docketed*, Nos. 81-2331, 81-2331, 81-2332 and 81-2333 (3d Cir. Aug. 24, 1981). In fact courts have since recognized that summary judgment is particularly apropos in antitrust cases:

> [T]he very nature of antitrust litigation would encourage summary disposition of such cases when permissible. Not only do antitrust trials often encompass a great deal of expensive and time consuming discovery and trial work, but also, . . . the statutory private antitrust remedy of treble damages affords a special temptation for the institution of vexatious litigation. . . . If a trial would serve no useful purpose, summary judgment is proper.

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16. One court has stated that the *Poller* case has become the "magic wand waved indiscriminately by those opposing summary judgment motions in antitrust actions." *Mutual Fund Investors, Inc. v. Putnam Management Co.*, 553 F.2d 620, 624 (9th Cir. 1977).

Lupia v. Stella D'Oro Biscuit Co., Inc., 586 F.2d 1163, 1167 (7th Cir. 1978), *cert. denied*, 440 US. 982, 99 S.Ct. 1791, 60 L.Ed.2d 242 (1979). *See In Re Municipal Bond Reporting Antitrust Litigation*, 672 F.2d 436 (5th Cir. 1982); *Solomon v. Houston Corrugated Box Co., Inc.*, 526 F.2d 389 (5th Cir. 1976). Although a party's right to trial should be carefully guarded, it is nonetheless clear that the filing of an antitrust complaint cannot insure a right to trial absent any significant probative evidence supporting the party's claims. *Harold Friedman, Inc. v. Kroger*, 581 F.2d 1068 (3d Cir. 1978), *citing First National Bank v. Cities Service Co.*, 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968). Such a party should not be permitted to proceed to trial in the hope of developing evidence to support his claims. *Parsons v. Ford Motor Co.*, 669 F.2d 308 (5th Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S.Ct. 73, 74 L.Ed.2d 72 (1982). Moreover, summary disposition of antitrust cases is proper even when employing the Rule of Reason. *See Evans v. S.S. Kresge Co.*, 544 F.2d 1184 (3d Cir. 1976), *cert. denied*, 433 U.S. 908, 97 S.Ct. 2973, 53 L.Ed.2d 1092 (1977). Thus summary judgment is an appropriate vehicle for disposing of this matter.

Under the special rules of this match-up if the offensive team does not score, the defendants win.

The Kickoff

Defendants first filed their motion for summary judgment in March of 1981. In their initial response and again at oral argument, plaintiffs contended that defendants' motion was premature as plaintiffs had not had the opportunity for adequate discovery.[17] *See Mannington Mills, Inc. v. Congoleum Industries, Inc.*, 610 F.2d 1059 (3d Cir. 1979). Agreeing that defendants were "offsides", I entered a Memorandum Order

17. At that time plaintiffs had several outstanding discovery requests and had not yet deposed any of the defendants.

permitting plaintiffs to pursue their discovery inquiry but limiting the scope solely to matters relating to the NFL's decision not to grant plaintiffs an NFL franchise in Memphis and to the NFL's prior practices and standards concerning the awarding of new franchises since the NFL-AFL merger.[18] Plaintiffs subsequently received additional material and deposed at length the four members of the expansion committee and Mr. Rozelle.

[5, 6] Defendants renewed their motion for summary judgment in December 1981. Again plaintiffs asserted that still they had not had sufficient discovery. It is well settled that the district court has discretion in controlling the discovery process. *Montecatini Edison S.p.A. v. E.I. du Pont de Nemours & Co.*, 434 F.2d 70 (3d Cir 1970). Where appropriate, a district court may limit a party's discovery as long as they are able to fully develop their case. *Staffin v. Greenberg*, 672 F.2d 1196 (3d Cir. 1982). *See First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968) (summary judgment in antitrust suit affirmed despite petitioner's claim it had been unduly restricted in its discovery).

Plaintiffs have had more than sufficient discovery to fully develop their case. All of the outstanding requests to which defendants have refused to respond are not calculated to lead to relevant evidence necessary to resolving this matter. As a result, I find that this case is now ripe for a decision on the merits.

The First Half

[7, 8] I will first address plaintiffs' Section 1 claim.[19] In the development of antitrust law some cases

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18. Plaintiffs had sought and received a volume of other material from defendants as a result of earlier discovery requests.

19. Unlike professional baseball, professional football does not enjoy the good fortune of being totally exempt from the antitrust laws. *Flood v. Kuhn*, 407 U.S. 258, 92 S.Ct. 2099, 32 L.Ed.2d 728 (1972). In two areas only does football escape the antitrust laws'

viewed group boycotts as *per se* violations. *See, e.g., Fashion Originators' Guild of America v. Federal Trade Commission,* 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941); *Klors, Inc. v. Broadway-Hale Stores, Inc.,* 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959). However it became apparent that not all group decisions refusing to do business with someone should be measured against the strict *per se* criteria enunciated in these earlier cases. *See Silver v. New York Stock Exchange,* 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963). *See also* L. Sullivan, *Handbook of the Law of Antitrust* §90 (1977). *Per se* violations should be found only where the involved agreements are so clearly anticompetitive and lacking in any redeeming quality that they can be conclusively presumed illegal without any further inquiry. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,* 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979); *National Society of Professional Engineers v. United States,* 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978). A threshold question here then is whether the decision of a professional sports league to deny an assertedly qualified applicant a franchise is unquestionably anticompetitive.

[9] Almost twenty years ago, Judge Grim of this court was called upon to decide the legality of the television policies of the NFL in *United States v. National Football League,* 116 F.Supp. 319 (E.D.Pa. 1953).[20] There he pointed out the differences between the production of professional sporting contests and normal business activity:

NOTE — *(Continued)*

watchful eye: joint agreements concerning the telecasting of games; and the merger in 1966 of the AFL with the NFL. 15 U.S.C. §1291 (1976).

20. Group decisions by the NFL concerning the telecasting of their games is now covered by statute. *See* 15 U.S.C. §§1291-95 (1976).

Professional football is a unique type of business. Like other professional sports which are organized on a league basis it has problems which no other business has. The ordinary business makes every effort to sell as much of its product or services as it can. In the course of doing this it may and often does put many of its competitors out of business. The ordinary businessman is not troubled by the knowledge that he is doing so well that his competitors are being driven out of business.

Professional teams in a league, however, must not compete too well with each other in a business way. On the playing field, of course, they must compete as hard as they can all the time. But it is not necessary and indeed it is unwise for all the teams to compete as hard as they can against each other in a business way. If all the teams should compete as hard as they can in a business way, the stronger teams would be likely to drive the weaker ones into financial failure. If this should happen not only would the weaker teams fail, but eventually the whole league, both the weaker and the stronger teams, would fail, because without a league no team can operate profitably.

It is particularly true in the National Football League that the teams should not compete too strongly with each other in a business way. The evidence shows that in the National Football League less than half the clubs over a period of years are likely to be financially successful. There are always teams in the League which are close to financial failure. Under these circumstances it is both wise and essential that rules be passed to help the weaker clubs in their competition with the stronger ones and to keep the League in fairly even balance.

Id. at 323. *See Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F.Supp. 462

(E.D.Pa. 1972). The view that the production of professional sports requires joint decisions of the different teams in order to insure their continued existence has become widely recognized. 16F J. von Kalinowski, *Antitrust Laws and Trade Regulation* §50.01 (1982); R. Bork, *The Antitrust Paradox*, Ch. 17, at 332 & 337-38 (1978). The Second Circuit recently reaffirmed this view in *North American Soccer League v. National Football League*, 670 F.2d 1249 (2d Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S.Ct. 499 (1982). Although rejecting the NFL's position that there was no Section 1 "contract, combination . . . or conspiracy" because they were a single entity, the court nevertheless recognized the need for joint activity:

> [T]he economic success of each franchise is dependent on the quality of sports competition throughout the league and the economic strength and stability of other league members. Damage to or losses by any league member can adversely affect the stability, success and operations of other members. . . . In view of this business interdependence team owners, through their leagues, invariably require that the sale of a franchise be approved by a majority of team owners rather than by the selling owner alone.

Id. at 1253. Because of the unique character of professional sports, then, courts have rejected the *per se* test and have routinely applied the Rule of Reason in deciding antitrust suits concerning league practices. *See, e.g., Brenner v. World Boxing Council*, 675 F.2d 445 (2d Cir. 1982), *cert. denied* ____ U.S. ____, 103 S.Ct. 79, 74 L.Ed.2d 76 (1982); *North American Soccer League v. National Football League, supra; United States Trotting Association v. Chicago Downs Association*, 665 F.2d 781 (7th Cir. 1981); *Neeld v. National Hockey League*, 594 F.2d 1297 (9th Cir. 1979); *Smith v. Pro-Football, Inc.* 593 F.2d 1173 (D.C.Cir. 1979); *Mackey v.*

National Football League, 543 F.2d 606, 609 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977).

[10, 11] The Rule of Reason test as enunciated in the landmark case of *Chicago Board of Trade v. United States*, 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683 (1918), mandates that a court determine whether the restraint imposed merely regulates and thereby promotes competition or is one that may suppress or destroy competition. In order to do this, the court:

> must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Id. at 238, 38 S.Ct. at 244.[21] Crucial to proving an antitrust violation under the Rule of Reason is a showing of anticompetitive intent or effect. *Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advertising Association*, 672 F.2d 1280 (7th Cir. 1982); *Tose v. First*

21. Plaintiffs ask that this court apply the test announced by the court in *Denver Rockets v. All-Pro Management, Inc.*, 325 F.Supp. 1049 (C.D.Cal. 1971). That court viewed the *Silver* case as an exception to the finding of group boycotts as per se violations for reasonably self-regulated industries. The test requires: (1) that there exists a legislative mandate for self-regulation or otherwise; (2) the group action is intended (a) to reach a result consistent with the policy justifying self-regulation; (b) is reasonably related to that goal; and (c) is no more expansive than necessary; and (3) there are procedural safeguards assuring the restraint is not arbitrary and which provides a basis for judicial review. *Id.* at 1064-65. This test has not been applied by the Third Circuit. Thus I will use instead the traditional Rule of Reason test, this test having been recently reaffirmed by the Third Circuit in *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139 (3d 1981), *cert. denied*, ____ U.S. ____, 102 Ct 1715, 17 L.Ed.2d 137 (1982)

Pennsylvania Bank, N.A., 648 F.2d 879, 892 & n. 17 (3d Cir.), *cert. denied*, 454 U.S. 893, 102 S.Ct. 390, 70 L.Ed.2d 208 (1981); *Associated Radio Service Co. v. Page Airways, Inc.*, 624 F.2d 1342 (5th Cir.1980), *cert. denied*, 450 U.S. 1030, 101 S.Ct. 1740, 68 L.Ed.2d 226 (1981). In this regard, the case of *Levin v. National Basketball Association*, 385 F.Supp. 149 (S.D.N.Y.1974) is instructive.

In *Levin*, the plaintiffs were two businessmen who had an agreement to buy the Boston Celtics basketball team. Before this deal could be consummated, it had to be approved by three-fourths of the members of the National Basketball Association ("NBA"), a league comparable to the NFL. The NBA failed to approve the sale.

The reasons for the disapproval were disputed by the parties. Plaintiffs alleged they were rejected only because they were friendly with an obstreperous and disliked member of the NBA. Defendants on the other hand claimed that to permit the transfer would result in a violation of a conflict of interest provision of the NBA constitution. The court decided, however, that the reason for the disapproval was irrelevant because whatever the reason, it was not anticompetitive.

> Here the plaintiffs wanted to *join* with those unwilling to accept them, *not to compete with them*, but to be partners in the operation of a sports league for plaintiffs' profit. Further, no matter which reason one credits for the rejection, it was not an anti-competitive reason. Finally, regardless of the financial impact of this rejection upon plaintiffs, if any, the exclusion of the plaintiffs from membership in the league did not have an anti-competive effect nor an effect upon the public interest.

Id. at 152 (footnote omitted) (emphasis in original). Because defendants' actions were not prompted by any

anticompetitive intent or effect, the court granted summary judgment in defendants' favor. [22]

The reasoning in the *Levin* case is applicable to plaintiffs here. They do not want to compete with the NFL. They tried that and failed. Now they seek to join the asserted antitrust violaters and share all the advantages of an established organization. Plaintiffs try to eschew this obvious conclusion by emphasizing that a franchise's revenue does not come solely from jointly earned profits; some money is earned by individual promotion, for example, of team paraphernalia and from local broadcast revenues. This does not change the obvious fact that the ability to earn these individual profits is an indirect benefit of being a member of the league. A franchise's popularity is inextricably bound up with the quality of its competition on the playing field and the resulting excitement and sense of team loyalty. If the Mid-South Grizzlies played inept teams, their revenue generating potential would no doubt drop. Plaintiffs simply are

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22. Two commentators on the law of sports have expressed the following view concerning the awarding of sports franchises:

> The admission practices of sports leagues present a different concern. An analysis of the relationship between clubs within a league suggests that the various league members do not compete with one another in an economic sense. Rather, a league is more like a partnership. While each club initially contributes its own capital, the various participants to a large extent share in the joint profits of the venture . This participation in profits is achieved through various arrangements, such as the pooling of television receipts and the division of gate receipts between home and visiting clubs. Thus, a decision on access to membership is basically a decision as to whether particular individuals (or their business entities) will be allowed to participate in the partnership venture. Since the various members pool their efforts and do not engage in economic competition with one another, an adverse decision on membership in the usual case has no appreciable impact on the level of competition which will take place.

J. Weistart & C. Lowell, *The Law of Sports* §3.16, at 315 (1979) (footnotes omitted).

not competitors of defendants who have been injured by any anticompetitive behavior of defendants.

In fact, were plaintiffs to prevail, the receipt of a franchise would be more anticompetitive than their failing to obtain one. Were plaintiffs' premise embraced by this court — that all acceptable applicants for franchises be given one—then motivation to form a rival league would be substantially dampened. *See* J. Weistart & C. Lowell, *The Law of Sports* §5.11, at 751 (1979).

Moreover, defendants acted fairly and objectively in deciding to reject plaintiffs' application. They met with plaintiffs at least three times over the course of four months to hear plaintiffs out and to explain the reasons why neither plaintiffs' nor any other application would be considered on the merits.[23] Rozelle and the Expansion Committee arranged a meeting between plaintiffs and the entire league membership despite their own belief and recommendation that further expansion not be initiated at that time. Plaintiffs' were thus afforded an opportunity to dissuade the membership from following the Committee's recommendation. Furthermore, Rozelle again reiterated the reasons for refusing plaintiff's application in a letter dated December 29, 1975. Exhibit 3B, Motion of Defendants for Summary Judgment and Addenda. There is no evidence that plaintiffs were treated in a manner less favorably than any other party expressing an interest in obtaining a franchise.

The fact defendants failed to fully consider plaintiffs' application on its merits does not suggest a contrary result. Defendants had substantial business reasons to justify their decision not to plan any further expansion at the time of plaintiffs' application. They were in the middle of assimilating the first two new teams in several

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23. In addition Mr. Bassett testified that he met with Mr. Rozelle another three or four times as well as talked with him on the telephone on three or four occasions. Bassett Deposition, January 21, 1981, at 103.

years each of which took three players from each existing team. Moreover, the NFL had several lawsuits against it which were creating a great deal of uncertainty as to the future of several NFL rules and policies. Given these factors, it was a business judgment that further expansion at that time would be foolhardy. Thus, an in depth inquiry into plaintiffs' application would have been a waste of defendants' and plaintiffs' time. To require such busywork for each application which was submitted to the defendants when it was already decided not to expand would simply be bad business.[24] It just does not make sense to pass judgment on a potential franchisee when no franchise is available and it would be equally as foolish to commit a future franchise to an entity which may not even be in existence or otherwise fail to qualify on the date the franchise becomes available.

[12] Recognizing the irrelevance of their game plan plaintiffs try an end run based upon their allegation that the defendants' sole motivation for rejecting them as a franchisee was their past involvement with the WFL. *See* J. Weistart & C. Lowell, *supra* §5.11, at 756-57. Plaintiffs fail, however, to muster any substantial evidence to support this assertion. Even where a state of mind is material in an antitrust case, there must be some demonstration that there is a sufficient quantum of evidence to permit a party to go to the jury. *White v. Hearst Corp.*, 669 F.2d 14, 17 (1st Cir. 1982).

The only evidence to support plaintiffs' allegation comes from the testimony of Mr. Bassett. At his deposition Mr. Bassett stated that some people had expressed the *opinion* that his past WFL affiliation would hurt his

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24. Mr. Rozelle testified that he has received inquiries from twenty to thirty cities about obtaining an NFL franchise since he became Commissioner in 1960. It is not clear how many of these submitted a formal application. Rozelle Deposition, November 12, 1981, at 28.

chances at obtaining an NFL franchise.[25] Some of this is speculation and some is hearsay. This is hardly the kind of play upon which to rely for an antitrust score.[26] Of particular importance, however, is that Bassett admitted these views were personal to the speakers and did not represent the NFL's position. Bassett Deposition, January 21, 1981, at 111-21. Notably, Bassett did not testify that similar statements were voiced by Rozelle[27] or any member of the Expansion Committee, all of whom already had decided further expansion would be unwise and recommended this course to the NFL membership. It is clear that if any mind-set existed, it was against immediate expansion and not against plaintiffs as franchise applicants.

[13] In plaintiffs' next series of downs they concentrate on the essential facility doctrine.[28] *See, e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973); *Hecht v. Pro-Football,*

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25. These people are Mr. Lynn, then General Manager of the Minnesota Vikings; Mr. Robbey, the owner of the Miami Dolphins; Mr. Thomas, then General Manager of the Baltimore Colts; and possibly Mr. Finks of the Chicago Bears. In addition, Mr. Keating, an NFL player representative, and Mr. Czonka, a former NFL and WFL player, stated they had heard Mr. Robbey express disfavor of Mr. Bassett's WFL activities. Lastly, a Mr. Mix, a former player and player representive said he had heard similar thoughts expressed by some NFL people. Bassett Deposition, January 21, 1981, at 111-21.

26. Indeed, it seems to me that for this play to have any chance at all it should be made in the context of the Memphis franchise having been awarded to another applicant.

27. In fact, Mr. Bassett testified Mr. Rozelle assured him his WFL past would not be held against him. Bassett Deposition, January 21, 1981, at 116 & 121.

28. The essential facility doctrine applies in the following situation: "[I]f a group of competitors, acting in concert, operate a common facility and if due to natural advantage, custom or restrictions of scale, it is not feasible for excluded competitors to duplicate the facility, the competitors who operate the facility must give access to the excluded competitors on reasonable non-discriminatory terms." L. Sullivan, *Handbook of the Law of Antitrust* §48, at 131 (1977).

Inc., 570 F.2d 982 (D.C.Cir.1977), *cert. denied*, 436 U.S. 956, 98 S.Ct. 3069, 57 L.Ed.2d 1121 (1978). Plaintiffs' reliance on this doctrine is misplaced. The doctrine is applicable only where a party is being denied access to something necessary for that party to engage in business which is controlled by his *competitors*. The *Hecht* case is illustrative.

In *Hecht*, plaintiffs were a group of promoters who had tried and failed to obtain an AFL franchise in Washington, D.C.[29] The apparent reason for this failure was the plaintiffs' inability to procure a contract with the only stadium suitable for professional football play due to a clause in the contract the stadium owner had with the NFL franchisee in the area which prohibited the stadium being leased for use by any other professional football team. The *Hecht* court held that the trial court erred in failing to instruct the jury concerning the essential facility doctrine.

[14, 15] In *Hecht* it was clear that a competitor was being denied access to an essential facility by a rival team in a different league. Such is not the case here. As previously stated, plaintiffs wish to join with defendants not compete with them. Nor are the defendants denying the Mid-South Grizzlies access to any stadium. Moreover, it is not economically infeasible for plaintiffs to engage in professional football. *Hecht v. Pro-Football, Inc.*, *supra*, at 992. Although not an easy task, plaintiffs are free to again attempt to form a rival football league.[30]

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29. Plaintiffs' attempt took place prior to the AFL's merger with the NFL in 1966.

30. In *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139 (3d Cir. 1981), *cert. denied*, ___ U.S. ___, 102 S.Ct. 1715, 72 L.Ed.2d 137 (1982), a manufacturer of bubble gum sued a rival bubble gum manufacturer and the Major League Baseball Players Association claiming the defendants had excluded effective competition in the sale of baseball cards because of their exclusive licensing contracts. The Third Circuit held that these contracts did not foreclose competition in part because Fleer could still compete for

Plaintiffs concede a history of a number of leagues appearing over the years. *See* Plaintiffs' Brief in Opposition to Defendant's Motion for Summary Judgment at 4-9. The AFL proved the task of forming a rival league is not impossible. Indeed, a new football league, the United States Football League ("USFL"), is currently being organized and John Bassett, the chief executive officer of the plaintiff Mid-South Grizzlies partnership, is the owner of the Tampa franchise in that league.[31] *See The Philadelphia Inquirer*, May 16, 1982, Section E, at 1.[32]

[16] For similar reasons, plaintiffs' reliance on several trade association cases is also inappropriate. *See, e.g., United States v. Realty Multi-List, Inc.*, 629 F.2d

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NOTE — *(Continued)*

licensing contacts with minor league players which, in time, may become major league players. The fact this process may take several years to become profitable, the court found, did not make the defendants' agreements anticompetitive.

31. Judicial notice may be used in resolving a motion for summary judgment. 10 C. Wright & A. Miller, *Federal Practice and Procedure* §2723 (1973).

32. Even were plaintiffs true competitors with defendants, I have serious doubts the essential facility doctrine would apply. The cases applying the doctrine involved the denial of access to physical structures or discreet services. *See, e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973) (electrical transmission lines); *Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963) (direct telephone access to stock exchange for instantaneous communication); *United States v. Terminal R.R. Ass'n*, 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912) (railroad switching facilities); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C.Cir. 1977), *cert. denied*, 436 U.S. 956, 98 S.Ct. 3069, 57 L.Ed.2d 1121 (1978) (football stadium); *Helix Milling Co. v. Terminal Flour Mills Co.*, 523 F.2d 1317 (9th Cir. 1975), *cert. denied*, 423 U.S. 1053, 96 S.Ct. 782, 46 L.Ed.2d 642 (1976) (flour mill); *United States v. Standard Oil Co.*, 362 F.Supp. 1331 (N.D.Cal. 1972), *aff'd*, 412 U.S. 924, 93 S.Ct. 2750, 37 L.Ed.2d 152 (1973) (fuel storage facilities). In contrast, plaintiffs seek to participate in an entire business organization. Thus, the principles enunciated in these cases seem inapposite.

1351 (5th Cir. 1980). In such cases, the courts have required that the association's membership criteria be fair, reasonable and the least restrictive as possible. The philosophical foundation for this rule is stated in the *Realty* case:

> When a group of competitors like the membership of RML [the trade association] join together to cooperate in the conduct of their business, there naturally arise antitrust suspicions. As Adam Smith, the archangel of the free enterprise system, observed, "People of the same trade seldom meet, even for merriment or diversion, but the conversation ends in a conspiracy against the public. . . ."

Id. at 1370 (citation omitted). Because the potential harm to outsiders is so great when their competitors are brought together through a trade association, the law requires access to the group be available to anyone who meets fair criteria. *Id.* at 1371-72; *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945).

[17] The evil that this rule is designed to thwart is absent in the case at bar. As stated earlier, the production of professional sports necessarily requires joint planning and decision making. Unlike normal business competitors, the teams are interdependent, *North American Soccer League v. National Football League*, 670 F.2d at 1251, and while the economic success of one team does not necessarily mean the success of another member, the stability which is derived from membership in a league produces a better product which is to the benefit of the public at large. They do not compete in the same manner as the independent businesses in these trade association cases. Thus, these cases are inapposite.

[18] Based upon the undisputed material facts I conclude as a matter of law that a Section 1 violation has not been made out. Thus, plaintiffs are scoreless at halftime.

The Second Half

Finding no Section 1 violation is not the end of the ball game. Plaintiffs also assert that defendants' behavior constitutes an unlawful act of monopolization proscribed by Section 2 of the Sherman Act. This effort also fails to penetrate the NFL's defensive line.

[19-21] There is no doubt that the NFL currently has a monopoly in the United States in major league football.[33] However, the possession of monopoly power in a relevant market alone is not enough to establish an antitrust violation. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093, 100 S.Ct. 1061, 62 L.Ed.2d 783 (1980). The antitrust laws were not intended to punish a business that has become a monopoly because of a "superior product, business acumen, or historic accident." *United States v. Grinnell*, 384 U.S. 563, 571, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966).[34] The law does require that a monopoly not abuse its power. Thus where a business possessing monopoly power willfully acquires or maintains such power, it will incur a penalty. *Id.* To avoid a Section 2 violation, then, a monopoly must "refrain at all times from conduct directed at smothering competition." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d at 275. Put another way, a monopoly abuses its power when it behaves in an "unreasonably exclusion-

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33. Judge Learned Hand in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), found a 90% share of a relevant market conclusive evidence of monopoly power. Plaintiffs allege that the relevant product market is major league professional football; the relevant geographic market is the United States, with a submarket in the "Mid-South" area comprised of Tennessee, Mississippi and Arkansas. Defendants do not dispute these contentions and I find them to be acceptable.

34. Judge Hand phrased it in this manner: "The successful competitor, having been urged to compete, must not be turned upon when he wins." *United States v. Aluminum Co. of America*, 148 F.2d at 430.

ary manner vis-a-vis rivals or potential rivals. . . ." *Byars v. Bluff City News Co., Inc.*, 609 F.2d 843, 853 (6th Cir. 1979); *Borden, Inc. v. Federal Trade Commission*, 674 F.2d 498, 513 (6th Cir. 1982).

[22] Once again plaintiffs fail to get the necessary yardage. Plaintiffs simply are not rivals or potential rivals of defendants except on the playing field. Moreover, despite plaintiffs' failure to obtain a franchise, they are still free to promote a rival league. The actions plaintiffs complain of here have done nothing to prevent the formation of a rival league or the fielding of a team in Memphis, Tennessee. Thus, no Section 2 violation has been shown as a matter of law. Plaintiffs fail to score again and the time has run out on the clock. Defendants win.

Post Game Analysis

I do not hold that the NFL and its members cannot be guilty of anticompetitive behavior but only that the denial upon demand of a new National Football League franchise to a qualified person does not run afoul of the antitrust laws.

Defendants are entitled to summary judgment on plaintiffs' claims under both Sections 1 and 2 of the Sherman Act.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MID-SOUTH GRIZZLIES, et al :
:
Civil Action
v. :
:
No. 79-4373
NATIONAL FOOTBALL LEAGUE, et al :

MEMORANDUM ORDER

This is an antitrust action against the National Football League ("NFL") and its composite members. Plaintiffs are individuals who were active in the formation of the World Football League ("WFL"), a competitor of the NFL. The WFL terminated operations on October 22, 1975.

The complaint alleges that plaintiffs organized a professional football team named the Mid-South Grizzlies; that on November 18, 1975 they applied for a NFL franchise for Memphis, Tennessee, a city that the NFL had previously designated as capable of financially sustaining a franchise; and that they satisfied all of the criteria for membership of the NFL. In Count One of the two-count complaint, plaintiffs allege that the defendants never considered the merits of their application for a franchise but rather, in retaliation for their participation in the WFL, have boycotted and collectively refused to deal with them. Plaintiffs contend that this conduct violates Section 1 of the Sherman Act, 15 U.S.C. §1.

Count Two of the complaint alleges a violation of Section 2 of the Sherman Act, 15 U.S.C. §2. Specifically, it is contended that since the Fall of 1975, defendants have combined and conspired "to maintain complete control over major league professional football activities

in the United States, to eliminate all competitors and potential competitors and to punish, intimidate and restrain plaintiffs and all other participants in the WFL from participation in major league professional football." Complaint ¶59.

Defendants have filed a motion for summary judgment pursuant to Fed.R.Civ.P. 56. Among the documents submitted in support of the motion are the affidavits of Pete Rozelle, Commissioner of the NFL and Daniel M. Rooney, Chairman of the Expansion Committee of the NFL. In their affidavits, these officials give a variety of reasons for the NFL's refusal to grant the plaintiffs' application for admission to the NFL.

Plaintiffs vigorously argue, however, that the granting of a motion for summary judgment at this time would be premature because they have not had the opportunity to conduct discovery in order to test the accuracy of the Rozelle and Rooney affidavits. Defendants have resisted plaintiffs requests for voluminous documents and answers to numerous interrogatories, claiming that they are unnecessary and unreasonable and that compliance would be unduly burdensome. A district court has discretion to protect a party from answering interroratories or producing documents if it would prove unduly burdensome or unreasonable. Fed.R.Civ.P. 26(c); *Bowman v. General Motors Corp.*, 64 F.R.D. 62, 68 n.6 (E.D.Pa. 1974).

I agree that plaintiffs should have the opportunity to test the sufficiency of these affidavits, see *Costlow v. United States*, 552 F.2d 560, 564 (3d Cir. 1977), but this does not mean that they are entitled to embark on a "fishing expedition" through defendants' records or to harass them with countless interrogatories. Accordingly, to protect the defendants but at the same time to permit the plaintiffs an opportunity to obtain adequate discov-

ery to support their claim, it is hereby ORDERED, pursuant to Fed.R.Civ.P. 26(c) and Local Rule 21, that:

1. Plaintiffs and defendants complete all their discovery before 5:00 p.m. on October 31, 1981.

2. Plaintiffs limit their requests for production of documents and interrogatories solely to matters relating to the NFL's decision not to grant the plaintiffs a NFL franchise at Memphis, Tennessee and to the NFL's prior practices and standards with respect to the admission of new franchise into the league since the merger of the NFL and the American Football League.

3. Plaintiffs' depositions of defendants be limited to Pete Rozelle, Daniel M. Rooney and other members of the NFL Expansion Committee and their inquiry be limited solely to matters relating to the NFL's decision to deny plaintiffs' application for a franchise at Memphis, Tennessee and the NFL's prior practices and standards with respect to the admission of new franchises into the league since the merger of the NFL and the American Football League.

After completion of discovery on October 31, 1981, defendants may renew their motion for summary judgment and supplement it with any materials made pertinent by Rule 56, but must do so by 5:00 p.m. on November 16, 1981.

5. Plaintiffs must file their opposition to defendants' renewal of their motion with all materials pertinent thereto no later than 5:00 p.m. on November 30, 1981.

6. If they so desire, defendants may file a reply brief to plaintiffs' opposition no later than 5:00 p.m. on December 8, 1981.

7. If they so desire, plaintiffs may file a counter-reply to defendants' reply no later than 5:00 p.m. on December 15, 1981.

BY THE COURT:

JOSEPH L. McGLYNN, JR., *J*

Date: 8/13/81

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1793

THE MID-SOUTH GRIZZLIES (a Joint Venture); JOHN EDWARD BOSACCO; MID-SOUTH GRIZZLIES (a Limited Partnership); and CONSOLIDATED INDUSTRIES, INC.,

Appellants

v.

THE NATIONAL FOOTBALL LEAGUE, an unincorporated association; BALTIMORE FOOTBALL CLUB, INC.; BUFFALO BILLS, INC.; CHARGERS FOOTBALL COMPANY; CHICAGO BEARS FOOTBALL CLUB, INC.; CINCINNATI BENGALS, INC.; CLEVELAND BROWNS, INC.; DALLAS COWBOYS FOOTBALL CLUB, INC.; DETROIT LIONS, INC.; FIVE SMITHS, INC.; GREEN BAY PACKERS, INC.; HOUSTON OILERS, INC.; KANSAS CITY CHIEFS FOOTBALL CLUB, INC.; LOS ANGELES RAMS FOOTBALL COMPANY; MIAMI DOLPHINS, LTD.; MINNESOTA VIKINGS FOOTBALL CLUB, INC.; NEW ENGLAND PATRIOTS FOOTBALL CLUB, INC.; NEW YORK FOOTBALL GIANTS, INC.; NEW YORK JETS FOOTBALL CLUB, INC.; NEW ORLEANS SAINTS LOUISIANA PARTNERSHIP; OAKLAND RAIDERS, LTD.; PHILADELPHIA EAGLES FOOTBALL CLUB, INC.; PITTSBURGH STEELERS SPORTS, INC.; PRO-FOOTBALL, INC.; ROCKY MOUNTAIN EMPIRE SPORTS, INC.; SAN FRANCISCO FORTY NINERS; SEATTLE PROFESSIONAL FOOTBALL, A General Partnership; ST. LOUIS FOOTBALL CARDINALS

COMPANY; TAMPA BAY AREA NFL FOOTBALL, INC. AND PETE ROZELLE

(D.C. Civil No. 79-4373)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, *Chief Judge;* GIBBONS and ROSENN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel September 13, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered November 5, 1982, be and the same is hereby affirmed. Costs taxed against appellants.

ATTEST:

Clerk

November 4, 1983

Certified as a true copy and issued in lieu of a formal mandate on February 7, 1984.
Test:

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1793

THE MID-SOUTH GRIZZLIES (a Joint Venture); JOHN EDWARD BOSACCO; MID-SOUTH GRIZZLIES (a Limited Partnership); and CONSOLIDATED INDUSTRIES, INC.,

Appellants

v.

THE NATIONAL FOOTBALL LEAGUE, an unincorporated association; BALTIMORE FOOTBALL CLUB, INC.; BUFFALO BILLS, INC.; CHARGERS FOOTBALL COMPANY; CHICAGO BEARS FOOTBALL CLUB, INC.; CINCINNATI BENGALS, INC.; CLEVELAND BROWNS, INC.; DALLAS COWBOYS FOOTBALL CLUB, INC.; DETROIT LIONS, INC.; FIVE SMITHS, INC.; GREEN BAY PACKERS, INC.; HOUSTON OILERS, INC.; KANSAS CITY CHIEFS FOOTBALL CLUB, INC.; LOS ANGELES RAMS FOOTBALL COMPANY; MIAMI DOLPHINS, LTD.; MINNESOTA VIKINGS FOOTBALL CLUB, INC.; NEW ENGLAND PATRIOTS FOOTBALL CLUB, INC.; NEW YORK FOOTBALL GIANTS, INC.; NEW YORK JETS FOOTBALL CLUB, INC.; NEW ORLEANS SAINTS LOUISIANA PARTNERSHIP; OAKLAND RAIDERS, LTD.; PHILADELPHIA EAGLES FOOTBALL CLUB, INC.; PITTSBURGH STEELERS SPORTS, INC.; PRO-FOOTBALL, INC.; ROCKY MOUNTAIN EMPIRE SPORTS, INC.; SAN FRANCISCO FORTY NINERS; SEATTLE PROFESSIONAL FOOTBALL, A General Partnership; ST. LOUIS FOOTBALL CARDINALS

COMPANY; TAMPA BAY AREA NFL FOOTBALL, INC. AND PETE ROZELLE

(D.C. Civil No. 79-4373)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge;* ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER and ROSENN, *Circuit Judges*

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Judge

Dated: December 5, 1983

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

December 23, 1983

Steve Alexander, Esquire
Sprague & Rubenstone
Suite 400, Wellington Bldg.
135 S. 19th Street
Phila., PA 19103

Re: The Mid-South Grizzlies, etc., Appellants vs.
The National Football League, etc.

No. 82-1793

Dear Counsel:

Enclosed herewith is a conformed copy of order filed today staying the issuance of the mandate to January 4, 1984, in the above-entitled case.

If during the period of the stay we receive notification from the Clerk of the Supreme Court that a petition for writ of certiorari has been filed, the stay shall continue until final disposition by the Supreme Court.

Very truly yours,

Sally Mrvos, *Clerk*

By _____
Deputy Clerk

CH
enc.
cc: Gary Green, Esquire
Morris L. Weisberg, Esquire
(James C. McKay, Esquire
(Constance J. Chatwood, Esquire

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1793

The Mid-South Grizzlies, etc., et. al., Appellants
v.
The National Football League, etc., et. al.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until January 4, 1984.

Circuit Judge

Dated: Dec. 23, 1983

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

January 9, 1984

Steven Alexander, Esquire
Sprague & Rubenstone
Suite 400, Wellington Bldg.
135 S. 19th St.
Phila., PA 19103

Re: The Mid-South Grizzlies, etc., et al., Appellants
vs. The National Football League, etc., et. al.

No. 82-1793

Dear Mr. Allexander: /further

Enclosed herewith is a conformed copy of order filed today staying the issuance of the mandate to February 3, 1984, in the above-entitled case.

If during the period of the stay we receive notification from the Clerk of the Supreme Court that a petition for writ of certiorari has been filed, the stay shall continue until final disposition by the Supreme Court.

Very truly yours,

Sally Mrvos, *Clerk*

By: _____
Betty J. Robinson
Deputy Clerk

sa

cc: Gary Green, Esquire
Morris L. Weisberg, Esquire.
(James C. McKay, Esquire
(Constance J. Chatwood, Esquire

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1793

The Mid-South Grizzlies, etc., et. al., Appellants
v.
The National Football League, etc., et. al.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby further stayed until February 3, 1984.

Circuit Judge

Dated: Jan. 9, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No.82-1793

THE MID-SOUTH GRIZZLIES, etc., et al.,
Appellants

v.

THE NATIONAL FOOTBALL LEAGUE, etc., et al.

(D. C. Civil No. 79-4373)

It appearing that a panel of this Court filed an Opinion and entered a Judgment on November 4, 1983, and it further appearing that appellants filed a timely petition for rehearing on November 18, 1983 which petition was denied on December 5, 1983, and it further appearing that the mandate was stayed to and including February 3, 1984 and it further appearing that appellants filed a motion on February 2, 1984 for a further stay of the mandate to and including March 5, 1984, and it further appearing that the Clerk's office erroneously issued the certified judgment in lieu of formal mandate on February 7, 1984, while the motion was still pending before the Court, all in the above-entitled case,

It is ORDERED that the certified judgment issued February 7,1984, be and hereby is recalled.

For the Court,

Chief Deputy Clerk

Dated: February 8, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1793

THE MID-SOUTH GRIZZLIES (a Joint Venture); JOHN EDWARD BOSACCO; MID-SOUTH GRIZZLIES (a Limited Partnership); and CONSOLIDATED INDUSTRIES, INC.,

Appellants

v.

THE NATIONAL FOOTBALL LEAGUE, an unincorporated association; BALTIMORE FOOTBALL CLUB, INC.; BUFFALO BILLS, INC.; CHARGERS FOOTBALL COMPANY; CHICAGO BEARS FOOTBALL CLUB, INC.; CINCINNATI BENGALS, INC.; CLEVELAND BROWNS, INC.; DALLAS COWBOYS FOOTBALL CLUB, INC.; DETROIT LIONS, INC.; FIVE SMITHS, INC.; GREEN BAY PACKERS, INC.; HOUSTON OILERS, INC.; KANSAS CITY CHIEFS FOOTBALL CLUB, INC.; LOS ANGELES RAMS FOOTBALL COMPANY; MIAMI DOLPHINS, LTD.; MINNESOTA VIKINGS FOOTBALL CLUB, INC.; NEW ENGLAND PATRIOTS FOOTBALL CLUB, INC.; NEW YORK FOOTBALL GIANTS, INC.; NEW YORK JETS FOOTBALL CLUB, INC.; NEW ORLEANS SAINTS LOUISIANA PARTNERSHIP; OAKLAND RAIDERS, LTD.; PHILADELPHIA EAGLES FOOTBALL CLUB, INC.; PITTSBURGH STEELERS SPORTS, INC.; PRO-FOOTBALL, INC.; ROCKY MOUNTAIN EMPIRE SPORTS, INC.; SAN FRANCISCO FORTY NINERS; SEATTLE PROFESSIONAL FOOTBALL, A General

Partnership; ST. LOUIS FOOTBALL CARDINALS COMPANY; TAMPA BAY AREA NFL FOOTBALL, INC. AND PETE ROZELLE

(D.C. Civil No. 79-4373)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, *Chief Judge;*
GIBBONS and ROSENN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel September 13, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered November 5, 1982, be and the same is hereby affirmed. Costs taxed against appellants.

ATTEST:

Clerk

November 4, 1983

Certified as a true copy and issued in lieu of a formal mandate on February 7, 1984.
Test:

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1793

THE MID-SOUTH GRIZZLIES, etc., et al.,
Appellants

v.

THE NATIONAL FOOTBALL LEAGUE, etc., et al.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until March 5, 1984.

s/ JOHN J. GIBBONS

Circuit Judge

Dated: February 13, 1984

NOTICE OF APPEAL
TO
U.S. COURT OF APPEALS, THIRD CIRCUIT
U.S. DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
U.S. TAX COURT

THE MID-SOUTH GRIZZLIES (A Joint Venture); JOHN EDWARD BOSACCO; MID-SOUTH GRIZZLIES (A Limited Partnership); and CONSOLIDATED INDUSTRIES, INC.	Circuit Court Docket Number 82-1793
v.	District or Tax Court
THE NATIONAL FOOTBALL LEAGUE, an unincorporated association, et al.	Docket No. CA No. 79-4373JLM
	District or Tax Court
	Judge Hon. Joseph L. McGlynn, Jr.

BALTIMORE FOOTBALL CLUB, INC.;
BUFFALO BILLS, INC.;
CHARGERS FOOTBALL COMPANY;
CHICAGO BEARS FOOTBALL CLUB, INC.;
CINCINNATI BENGALS, INC.;
CLEVELAND BROWNS, INC.;
DALLAS COWBOYS FOOTBALL CLUB, INC.;
DETROIT LIONS, INC.;
FIVE SMITHS, INC.;
GREEN BAY PACKERS, INC.;
HOUSTON OILERS, INC.;
KANSAS CITY CHIEFS FOOTBALL CLUB, INC.;
LOS ANGELES RAMS FOOTBALL COMPANY;

MIAMI DOLPHINS, LTD.;	:
MINNESOTA VIKINGS FOOTBALL CLUB, INC.;	:
NEW ENGLAND PATRIOTS FOOTBALL CLUB, INC.;	
NEW YORK FOOTBALL GIANTS, INC.;	:
NEW YORK JETS FOOTBALL CLUB, INC.;	:
NEW ORLEANS SAINTS LOUISIANA PARTNERSHIP;	:
OAKLAND RAIDERS, LTD.;	:
PHILADELPHIA EAGLES FOOTBALL CLUB, INC.;	:
PITTSBURGH STEELERS SPORTS, INC.;	:
PRO-FOOTBALL, INC.;	:
ROCKY MOUNTAIN EMPIRE SPORTS, INC.;	:
SAN FRANCISCO FORTY NINERS;	:
SEATTLE PROFESSIONAL FOOTBALL,	:
A General Partnership;	:
ST. LOUIS FOOTBALL CARDINALS COMPANY;	:
TAMPA BAY AREA NFL FOOTBALL, INC.;	:
and PETE ROZELLE,	: CIVIL ACTION
Defendants	: No. 79-4373JLM

Notice is hereby given that The Mid-South Grizzlies, et al., plaintiffs appeals to the United States Court of Appeals for the Third Circuit from ( ) Judgment (X) Order ( ) Other (Specify) Order and Memorandum of Decision granting defendants' motion for summary judgment.
entered in this action on November 5, 1982.

Dated:

Counsel for Appellant — Signature

Steven Alexander, *Esquire*

Name of Counsel—Typed

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1793

THE MID-SOUTH GRIZZLIES (a Joint Venture); JOHN EDWARD BOSACCO; MID-SOUTH GRIZZLIES (a Limited Partnership); and CONSOLIDATED INDUSTRIES, INC.,

Appellants

v.

THE NATIONAL FOOTBALL LEAGUE, an unincorporated association; BALTIMORE FOOTBALL CLUB, INC.; BUFFALO BILLS, INC.; CHARGERS FOOTBALL COMPANY; CHICAGO BEARS FOOTBALL CLUB, INC.; CINCINNATI BENGALS, INC.; CLEVELAND BROWNS, INC.; DALLAS COWBOYS FOOTBALL CLUB, INC.; DETROIT LIONS, INC.; FIVE SMITHS, INC.; GREEN BAY PACKERS, INC.; HOUSTON OILERS, INC.; KANSAS CITY CHIEFS FOOTBALL CLUB, INC.; LOS ANGELES RAMS FOOTBALL COMPANY; MIAMI DOLPHINS, LTD.; MINNESOTA VIKINGS FOOTBALL CLUB, INC.; NEW ENGLAND PATRIOTS FOOTBALL CLUB, INC.; NEW YORK FOOTBALL GIANTS, INC.; NEW YORK JETS FOOTBALL CLUB, INC.; NEW ORLEANS SAINTS LOUISIANA PARTNERSHIP; OAKLAND RAIDERS, LTD.; PHILADELPHIA EAGLES FOOTBALL CLUB, INC.; PITTSBURGH STEELERS SPORTS, INC.; PRO-FOOTBALL, INC.; ROCKY MOUNTAIN EMPIRE SPORTS, INC.; SAN FRANCISCO FORTY NINERS; SEATTLE PROFESSIONAL FOOTBALL, A General Partnership; ST. LOUIS FOOTBALL CARDINALS

COMPANY; TAMPA BAY AREA NFL FOOTBALL, INC. AND PETE ROZELLE

(D.C. Civil No. 79-4373)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, *Chief Judge;*
GIBBONS and ROSENN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel September 13, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered November 5, 1982, be and the same is hereby affirmed. Costs taxed against appellants.

ATTEST:

Clerk

November 4, 1983

15 U.S.C.

§15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

(Oct. 15, 1914, c. 323, §4, 38 Stat. 731.)

15 U.S.C.

§1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved,

between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

(July 2, 1890, c. 647, §1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.)

§2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

(July 2, 1890, c. 647, §2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.)

§1291. Exemption from antitrust laws of agreements covering telecasting of sports contests and combining of professional football leagues

The antitrust laws, as defined in section 1 of the Act of October 15, 1914, as amended (38 Stat. 730), or in the Federal Trade Commission Act, as amended (38 Stat. 717), shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the

rights of such league's member clubs in the sponsored telecasting of the games of football, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs. In addition, such laws shall not apply to a joint agreement by which the member clubs of two or more professional football leagues, which are exempt from income tax under section 501(c)(6) of Title 26, combine their operations in expanded single league so exempt from income tax, if such agreement increases rather than decreases the number of professional football clubs so operating, and the provisions of which are directly relevant thereto.

(Pub.L. 87-331, §1, Sept. 30, 1961, 75 Stat. 732; Pub.L. 89-800, §6(b)(1), Nov. 8, 1966, 80 Stat. 1515.)

§1292. Area telecasting restriction limitation

Section 1291 of this title shall not apply to any joint agreement described in the first sentence in such section which prohibits any person to whom such rights are sold or transferred from televising any games within any area, except within the home territory of a member club of the league on a day when such club is playing a game at home.

(Pub.L. 87-331, §2, Sept. 30, 1961, 75 Stat. 732; Pub.L. 89-800, §6(b)(2), Nov. 8, 1966, 80 Stat. 1515.)

§1293. Intercollegiate and interscholastic football contest limitations

The first sentence of section 1291 of this title shall not apply to any joint agreement described in such section which permits the telecasting of all or a substantial part of any professional football game on any Friday after six o'clock postmeridian or on any Saturday during the period beginning on the second Friday in September and ending on the second Saturday in December in any year from any telecasting station located within seventy-five miles of the game site of any intercollegiate or interscholastic football contest scheduled to be played on such a date if—

(1) such intercollegiate football contest is between institutions of higher learning both of which confer degrees upon students following completion of sufficient credit hours to equal a four-year course, or

(2) in the case of an interscholastic football contest, such contest is between secondary schools, both of which are accredited or certified under the laws of the State or States in which they are situated and offer courses continuing through the twelfth grade of the standard school curriculum, or the equivalent, and

(3) such intercollegiate or interscholastic football contest and such game site were announced through publication in a newspaper of general circulation prior to August 1 of such year as being regularly scheduled for such day and place.

(Pub.L. 87-331, §3, Sept. 30, 1961, 75 Stat. 732; Pub.L. 89-800, §6(b)(3), Nov. 8, 1966, 80 Stat. 1515).

§1294. Antitrust laws unaffected as regards to other activities of professional sports contests

Nothing contained in this chapter shall be deemed to change, determine, or otherwise affect the applicability or nonapplicability of the antitrust laws to any act, contract, agreement, rule, course of conduct, or other activity by, between, or among persons engaging in, conducting, or participating in the organized professional team sports of football, baseball, basketball, or hockey, except the agreements to which section 1291 of this title shall apply.

(Pub.L. 87-331, §4, Sept. 30, 1961, 75 Stat. 732.)

§1295. "Persons" defined

As used in this chapter, "persons" means any individual, partnership, corporation, or unincorporated association or any combination or association thereof.

(Pub.L. 87-331, §5, Sept. 30, 1961, 75 Stat. 732.)

Fed.R.Civ.P.

Rule 56. Summary Judgment

• • •

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

• • •

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavits facts essential to justify his opposition, the court may refuse the application for judgments or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE MID-SOUTH GRIZZLIES (a Joint Venture); JOHN EDWARD BOSACCO; MID-SOUTH GRIZZLIES (a Limited Partnership); and CONSOLIDATED INDUSTRIES, INC.,	:	CIVIL ACTION NO. 79-4373
Plaintiffs,	:	
v.	:	
THE NATIONAL FOOTBALL LEAGUE, an unincorporated association; BALTIMORE FOOTBALL CLUB, INC.; BUFFALO BILLS, INC.; CHARGERS FOOTBALL COMPANY; CHICAGO BEARS FOOTBALL CLUB, INC.; CINCINNATI BENGALS, INC.; CLEVELAND BROWNS, INC.; DALLAS COWBOYS FOOTBALL CLUB, INC.; DETROIT LIONS, INC.; FIVE SMITHS, INC.; GREEN BAY PACKERS, INC.; HOUSTON OILERS, INC.; KANSAS CITY CHIEFS FOOTBALL CLUB, INC.; LOS ANGELES RAMS FOOTBALL COMPANY; MIAMI DOLPHINS, LTD.; MINNESOTA VIKINGS FOOTBALL CLUB, INC.; NEW ENGLAND PATRIOTS FOOTBALL CLUB, INC.;	:	

NEW YORK FOOTBALL GIANTS, INC.;	:	
NEW YORK JETS FOOTBALL CLUB, INC.;	:	
NEW ORLEANS SAINTS LOUISIANA PARTNERSHIP;	:	
OAKLAND RAIDERS, LTD.;	:	
PHILADELPHIA EAGLES FOOTBALL CLUB, INC.;	:	
PITTSBURGH STEELERS SPORTS, INC.;	:	
PRO-FOOTBALL, INC.;	:	
ROCKY MOUNTAIN EMPIRE SPORTS, INC.;	:	
SAN FRANCISCO FORTY NINERS;	:	
SEATTLE PROFESSIONAL FOOTBALL, A General Partnership;	:	
ST. LOUIS FOOTBALL CARDINALS COMPANY;	:	
TAMPA BAY AREA NFL FOOTBALL, INC.;	:	
and PETE ROZELLE,	:	JURY TRIAL
Defendants.	:	DEMANDED

COMPLAINT

The above-named plaintiffs, by and through their counsel, Sprague, Goldberg & Rubenstone, file this Complaint against the above-named defendants and state as follows:

COUNT I.

A.

JURISDICTION AND VENUE

1. This action is brought to secure treble damages from each defendant pursuant to Section 4 of the Clayton Act (15 U.S.C. §15) for defendants' violations of Sec-

tion 1 of the Sherman Act (15 U.S.C. §1), as hereinafter alleged.

2. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1337.

3. Each defendant transacts business in and is found, has an agent or resides within the Eastern District of Pennsylvania or has carried on the unlawful activities herein alleged, in part, in the Eastern District of Pennsylvania. The interstate commerce activities described below are carried on, in part, in the Eastern District of Pennsylvania.

B.

PARTIES

4. Plaintiff Mid-South Grizzlies is a Joint Venture (herein "Joint Venture") established on November 1, 1975 and consisting of the following joint venturers: Mid-South Grizzlies, a Tennessee limited partnership, John Edward Bosacco, a citizen and resident of the Commonwealth of Pennsylvania, and Consolidated Industries, Inc., a California corporation.

5. Plaintiff John Edward Bosacco ("Bosacco") is a citizen and resident of the Commonwealth of Pennsylvania and resides at 344 W. Front Street, Media, Pennsylvania.

6. Plaintiff Mid-South Grizzlies is a Tennessee limited partnership. The general partner of Mid-South Grizzlies is Toronto Football, a limited partnership. The Chief Executive officer of Mid-South Grizzlies is John F. Bassett.

7. Plaintiff Consolidated Industries, Inc., is a California corporation, having its principal place of business at 1377 W. Shaw Avenue, Fresno, California. It is solely owned and controlled by William R. Tatham.

8. Defendant National Football League (hereinafter referred to as "NFL") is an unincorporated association with its headquarters at 410 Park Avenue, New

York, New York. Defendant NFL was organized for the purpose of engaging in the business of major league professional football. Defendant NFL is made up of and is operated by its member-professional football teams located in several cities throughout the United States, as identified in paragraph 10 of this Complaint, including defendant Philadelphia Eagles Football Club, Inc., which is located in the Eastern District of Pennsylvania and which plays professional football games on a regular basis with other defendant member-clubs in the Eastern District of Pennsylvania. Defendant NFL is found, has an agent in and transacts business in the Eastern District of Pennsylvania.

9. Defendant Pete Rozelle ("Rozelle") is an individual and is the Commissioner of the defendant NFL, with his office at 410 Park Avenue, New York, New York. Defendant Rozelle is found, has an agent in or transacts business in the Eastern District of Pennsylvania.

10. The remaining twenty-eight defendants abovenamed are members of the defendant NFL, were members of defendant NFL at the time of the illegal acts complained of in this Complaint, and operate major league professional football teams in their respective cities and in each other city in which defendants member-clubs are located pursuant to a schedule fixed by the defendants NFL and Rozelle. They are:

	PRINCIPAL PLACE OF BUSINESS
Baltimore Football Club, Inc. (Baltimore Colts)	11000 Bonita Avenue Ellings Mill, Maryland
Buffalo Bills, Inc.	1 Bills Drive Orchard Park, New York
Chargers Football Company (San Diego Chargers)	San Diego Stadium 9449 Friars Road San Diego, California
Chicago Bears Football Club, Inc.	533 E. Jackson Street Chicago, Illinois
Cincinnati Bengals, Inc.	200 Riverfront Stadium Cincinnati, Ohio

Cleveland Browns, Inc.	Cleveland Stadium Cleveland, Ohio
Dallas Cowboys Football Club, Inc.	Expressway Tower Building 6116 N. Central Expressway Dallas, Texas
Detroit Lions, Inc.	1200 Featherstone Street Pontiac, Michigan
Five Smiths, Inc. (Atlanta Falcons)	317 I-85 Buford, Georgia
Green Bay Packers, Inc.	1265 Lombardi Avenue Green Bay, Wisconsin
Houston Oilers, Inc.	6910 Fannon Street Houston, Texas
Kansas City Chiefs Football Club, Inc.	1 Arrowhead Drive Arrowhead Stadium Kansas City, Missouri
Los Angeles Rams Football Company	10271 W. Pico Blvd. Los Angeles, California
Miami Dolphins, Ltd.	330 Biscayne Blvd. Miami, Florida
Minnesota Vikings Football Club, Inc.	7110 France Avenue Edina, Minnesota
New England Patriots Football Club, Inc.	Schaefer Stadium Foxboro, Massachusetts
New York Football Giants, Inc.	Giant Stadium East Rutherford, New Jersey
New York Jets Football Club, Inc.	598 Madison Avenue New York, New York
New Orleans Saints Louisiana Partnership	1500 Poygras Street New Orleans, Louisiana
Oakland Raiders, Ltd.	7811 Oak Port Street Oakland, California
Philadelphia Eagles Football Club, Inc.	Veterans Stadium Broad and Pattison Avenues Philadelphia, Pennsylvania
Pittsburgh Steelers Sports, Inc.	Three River Stadium 300 Stadium Circle Pittsburgh, Pennsylvania
Pro-Football, Inc. (Washington Redskins)	J.F.K. Stadium Washington, D.C.
Rocky Mountain Empire Sports, Inc. (Denver Broncos)	5700 Logan Street Denver, Colorado
San Francisco Forty Niners	1255 Post Street Suite 300 San Francisco, California

Seattle Professional Football (Seattle Seahawks)	5305 Lake Washington Blvd., N.E. Kirkland, Washington
St. Louis Football Cardinals Company	200 Stadium Plaza St. Louis, Missouri
Tampa Bay Area NFL Football, Inc. (Tampa Bay Buccaneers)	1 Buccaneer Place Tampa, Florida

11. Each of the foregoing defendants is found in, has an agent in, resides or transacts business within the Eastern District of Pennsylvania.

C.

CO-CONSPIRATORS

12. Various other persons, firms entities and corporations, not named or made defendants herein, have participated as co-conspirators with defendants in the offenses charged in this Complaint, have performed acts declared illegal by the Sherman Act and have acted in furtherance of the unlawful conspiracy, in unreasonable restraint of trade, group boycott, monopolization, attempted monopolization and conspiracy to monopolize, as is hereinafter alleged.

D.

INTERSTATE COMMERCE

13. The conduct of the defendants and co-conspirators constitute, involve and affect commerce among the several states including, *inter alia*, the nationwide presentation of televised games, the purchase of substantial quantities of equipment and supplies across state lines, the sale of admission tickets to professional football games across state lines, the convening of meetings of NFL members who travel across state lines to attend such meetings, the transportation of players, coaches and personnel across state lines for the presentation of games, the promotion of professional football and the in-

terstate advertising of professional football events within the scope and jurisdiction of §1 of the Sherman Act, 15 U.S.C. §1.

E.

BACKGROUND OF THE INDUSTRY

14. Major league professional football is a major spectator sport throughout the United States conducted by and through teams of players to provide the general public with highly skilled exhibitions of the game of football.

15. Each major league professional football team in existence in the United States is a member of the defendant NFL. The NFL,as it is presently constituted, is the product of a merger between the NFL and the American Football League in 1966. There is no other major professional football league presently operating or in existence in the United States.

16. The defendant NFL, with and through each of its member-defendants herein, operates and promotes the holding of major league professional football games, including regularly scheduled, playoff and championship games, and, in addition, performs various administrative and promotional functions, including, but not limited to, organizing and scheduling such games, providing officials for supervision of such games, establishing rules for such games and for the recruitment of players and player contracts, negotiating the sale of and rights to broadcast and rebroadcast such games over radio and television facilities, providing for the sale of various subsidiary promotional rights, establishing rules for the admission of new members and transfer of member-clubs, and exercising overall supervision over the activities of major league professional football.

17. The NFL performs its functions pursuant to a Constitution and By-Laws, and by and through defendant Rozelle and various committees and subcommittees,

comprised of the defendants member-clubs and their representatives.

18. Each member-club defendant of the defendant NFL has paid a franchise fee to the NFL in order to conduct and operate a major league professional football team. The proceeds of the franchise fees are distributed among the then existing member-clubs of the NFL. Each member-club is regularly assessed certain dues and fees to cover the expenses incurred by the defendant NFL in the operation and administration of the NFL and its various activities.

19. New franchises in the NFL are granted by the defendant NFL and the defendant member-clubs. At the time of the events complained of in this Complaint, a new franchise was granted by the NFL only upon the consent of 75% of the then existing member-clubs in the NFL, or twenty of the then-existing member-clubs of the NFL, whichever amount is greater.

20. The World Football League ("WFL") was organized in 1973 and operated in 1974 and through October, 1975. During this period, the WFL competed with the defendant NFL for both professional football players, spectators and various other promotional and sales markets. The WFL was comprised of 12 professional football teams in 1974 and 11 professional football teams in 1975.

21. Plaintiff Bosacco owned and operated the "Philadelphia Bell," a member team in the WFL.

22. Plaintiff Mid-South Grizzlies, a limited partnership, owned and operated the "Memphis Southmen," also known as the "Memphis Grizzlies," a member team in the WFL.

23. Plaintiff Consolidated Industries, Inc. owned and operated the "Portland Storm," a member team in the WFL.

24. Since the WFL ceased its operations in 1975, the NFL has had a complete monopoly over major league professional football in the United States.

F.

RELEVANT MARKET

25. The relevant product/service market is major league professional football. The relevant geographic area is the United States. A relevant geographic submarket is the Memphis, Tennessee and the Mid-South area, comprised of the states of Tennessee, Mississippi and Arkansas. More than six million people live in this area. The Mid-South area has no representation in the NFL.

26. Major league professional football constitutes a market which is separate and distinct from the exhibition of minor league or other professional, semi-professional, collegiate or high school football contests or other sporting activities, forms of public shows, spectacles and entertainment events. It is the only class of professional football which attracts widespread public interest, which is regularly publicized in newspapers and magazines and which attracts network television and radio sponsorship.

27. Defendant NFL is and the defendant member-clubs constitute the only national, major, professional football league in the United States, and have a complete and absolute monopoly in the relevant product and geographic markets.

G.

VIOLATIONS ALLEGED

28. This Count is brought pursuant to §1 of the Sherman Act, 15 U.S.C. §1. Plaintiff herein incorporates and reallege paragraphs 1 through 27 of this Complaint, as if fully set forth herein.

29. The defendants and their co-conspirators have entered into and engaged in unlawful acts, combinations, conspiracies, contracts, conduct, concerts of action, practices, agreements understandings and de-

vices, as is more specifically set forth in the following paragraphs of this Complaint, to effectuate the following purposes.

(a) To boycott and collectively refuse to deal with plaintiff in and from the business of major league professional football in the United States;

(b) To retaliate against plaintiffs for their prior activities in organizing and participating in a competing major professional football league, and to intimidate, as a result, all persons who may desire to compete with defendants through the establishment of competing leagues;

(c) To discriminate arbitrarily against plaintiffs as to their application for membership in defendant NFL without regard to the objective qualifications of plaintiffs and to give preference to certain other applicants solely on the basis of personal affiliations;

(d) To deny plaintiffs' access to a jointly-owned and operated "bottleneck" facility, to wit: the only national, major professional football league in the United States, without employment of any objective and formulated criteria for admission to such entity or of any semblance of procedural standards against which plaintiffs' qualifications for membership could be compared;

(e) To reserve the territorial area known as the "Mid-South" region of the United States for the purpose of future expansion by one or more of the defendants themselves or by other persons having personal or financial affiliations with the defendants, without regard to the plaintiffs' qualifications for and right to engage in major league professional football in the "Mid-South" territory; and

(f) To maintain defendants' complete control over major league professional football activities in the United States.

30. On November 1, 1975, plaintiffs Bosacco, Mid-South Grizzlies and Consolidated Industries, Inc. entered into a Joint Venture Agreement ("Agreement"). The purpose of the Agreement was to organize a major league professional football organization to be known as the "Memphis Grizzlies," to apply to the NFL for, and to subsequently obtain, membership in the NFL, and to enable plaintiffs to continue their involvement and participation in major league professional football.

31. Plaintiff Mid-South Grizzlies, pursuant to the Agreement, was designated "managing partner" of the Joint Venture.

32. Plaintiffs were ready, willing and able to compete in the NFL, the only professional football major league in existence. Plaintiffs prepared completely for competing in the NFL for the 1976 season by accomplishing the following:

(a) Pursuant to the terms of the Agreement, plaintiffs each made capital contributions to the Joint Venture in sums in excess of $150,000.00, and agreed to contribute, as required and on a pro-rata basis, such additional sums as would be necessary to enable the Joint Venture to meet all of its current and future obligations and financial requirements as an NFL member.

(b) Upon execution of the Agreement, the plaintiffs organized a complete major league professional football organization.

(c) As components of that major league professional organization, the Joint Venture signed thirty-one (31) major league professional football players to contracts, all of whom were highly-skilled and capable employees.

(d) Included among those players were two NFL All-Pros, eight other NFL veterans, five other Canadian Football League veterans and sixteen WFL veterans.

(e) As an additional component of that organization, the Joint Venture signed a seven man, veteran coaching staff to contracts. The Head Coach was the only professional football coach in the United States to amass seventeen regular season victories in 1974 and was, from 1976 to 1978, the Head Coach of defendant New York Giants, and is presently Director of Player Personnel of defendant San Francisco Forty Niners.

(f) President of the Joint Venture was John Bassett. Bassett was former president of the World Football League Memphis Southmen, former President of the Executive Committee of the WFL and a former director of the Toronto Argonaut professional football team of the Canadian Football League.

(g) Executive Vice-President and General Manager of the Joint Venture was Michael Storen. Storen was former Commissioner of the American Basketball Association and founder of the Indiana Pacers professional basketball team, presently a member team in the National Basketball Association.

(h) On October 28, 1975, the City Council of Memphis, Tennessee adopted a formal resolution calling for the expansion of the Memphis Memorial Stadium from 50,000 to 72,000 seats for the express purpose, *inter alia*, of providing larger facilities for an NFL franchise to be awarded to the plaintiffs.

(i) On October 28, 1975, the Joint Venture received the written support of the Memphis Area

Chamber of Commerce, said entity specifically pledging its "full resources" and "maximum staff support" to plaintiffs' application for membership in defendant NFL.

(j) On November 6, 1975, the Joint Venture entered into a lease with the City of Memphis, Tennessee for the use of Memphis Memorial Stadium. Memphis Memorial Stadium compares favorably with the great majority of current NFL stadiums. The lease was to run for ten years (five years plus an option for five years), commencing with the start of the 1976 NFL season.

(k) On November 12, 1975, the Joint Venture received the written support of the Mayor of Memphis, on behalf of himself and the municipality of Memphis, Tennessee, for plaintiffs' application for membership in defendant NFL.

(l) During 1975, the Joint Venture sold in excess of 46,000 season tickets for the 1976 season, plus a firm commitment for all remaining seats. Thus, the Joint Venture achieved a complete sellout for all seats in the stadium for the 1976 season.

33. Beginning in the Fall of 1975, or at some other date presently unknown to plaintiffs, the defendants conspired, combined and contracted among themselves and with their co-conspirators to boycott plaintiffs and to refuse to accept or consider plaintiffs' application for membership in the NFL.

34. On or about October 23, 1975, plaintiffs publicly announced their intention to file an application for membership in the NFL.

35. On November 3, 1975, counsel for the Joint Venture notified defendant Rozelle, by letter of the same date, of plaintiffs' intention to submit a formal application for membership in the NFL for the 1976 season.

36. On November 17, 1975, the Joint Venture filed an application for membership ("application") in the NFL in conformity with the Constitution and By-Laws of the NFL.

37. In accordance with the rules of the NFL, the Joint Venture submitted, with its application, a certified check payable to the NFL in the amount of $25,000.

38. In further accordance with the rules of the NFL, the Joint Venture annexed to the application complete documentation demonstrating full compliance by the plaintiffs with all of the rules of the NFL concerning application for membership, including, *inter alia*, documentation of all steps taken by the Joint Venture and plaintiffs to compete in the NFL.

39. On December 17, 1975, plaintiffs, plaintiffs' Executive Vice-President Mike Storen, and two of plaintiffs' attorneys met with the NFL expansion committee. At that meeting, the expansion committee informed plaintiffs that it had not and would not review plaintiffs' application for membership on the merits, that it was not prepared to discuss the application itself and that it would recommend to the defendant NFL and the defendant NFL member-clubs that plaintiffs' application:

(a) not be considered on its merits; and

(b) be rejected by defendants.

40. Upon information and belief, it is averred that sometime shortly after December 19, 1975, the NFL Expansion Committee recommended to the defendant NFL and the defendant NFL member-clubs that plaintiffs' application not be considered on its merits, that the application be rejected and that no expansion by the NFL take place.

41. Despite the fact that plaintiffs' written application for membership in the NFL was for 1976, plaintiffs repeatedly advised the defendants, including defendant Rozelle, that they would be willing to accept a franchise

in the NFL for 1977, and that they would take whatever steps were necessary to maintain their organization so that it could commence operations in 1977.

42. In January, 1976, at a meeting of defendants in New York, New York, plaintiffs met with defendants and their co-conspirators, presented their application, requested consideration and approval of that application and, among other matters, informed them of plaintiffs' willingness to accept a year other than 1976 for admission to the NFL.

43. At a meeting with defendants on or about March 17, 1976 in San Diego, California, plaintiffs specifically informed defendants that plaintiffs would accept whatever additional terms defendants desired in order to obtain membership in the NFL.

44. On or about March 17, 1976, plaintiffs met with the defendant NFL's Executive Committee to make an additional presentation of their application and, among other matters, informed defendants that the defendants could consider plaintiffs' application amended to the effect that plaintiffs would accept a franchise for whatever year desired by defendants.

45. On or about March 17, 1976, defendants met and formally voted to reject plaintiffs' application. On or about March 17, 1976, defendant Rozelle publicly announced that the NFL had rejected plaintiffs' application.

46. Said refusal was pursuant to an agreement, understanding and conspiracy entered into by and among the NFL member-club defendants, the NFL, Rozelle and their co-conspirators. No consideration was given to the merits of plaintiffs' application or to the possibility and feasibility of granting to plaintiffs a franchise in the NFL, and no basis for the rejection of plaintiffs' application was articulated or formulated by defendants.

47. The NFL would have had no difficulty in designing and implementing a schedule for the 1976 football season to include a Memphis franchise, since plain-

tiffs' formal application was filed nine months prior to the start of the 1976 season and well before the 1976 NFL schedule was set up. Further, informal notice of the filing of the application had been given to the NFL by plaintiffs a full 10 months prior to the start of the 1976 football season.

48. The plaintiffs' application presented no other legitimate difficulties to defendants.

49. In late 1974, defendants awarded expansion franchises for Tampa, Florida, and Seattle, Washington. Said franchises were to begin participation in the NFL in 1976.

50. Plaintiffs' application, including the documentation attached to that application, demonstrated that they were more qualified than the Tampa and Seattle applicants for membership in the NFL.

51. Memphis is a highly desirable submarket for major league professional football, and has been considered as such by the defendant NFL for many years, both prior and subsequent to 1975.

52. The Tampa and Seattle applicants had no former ties with the WFL.

53. Plaintiffs are all former owners of WFL football teams and, as such, were competitors of the defendants. All of the thirty-one football players under contract to the Memphis Grizzlies were former NFL, WFL and Canadian Football League professional football players, and, of those players, twelve were subsequently signed by defendant NFL member-clubs and played professional football in the NFL, and, in addition, six of those players were subsequently signed by Canadian Football League teams and played professional football in the Canadian Football League.

54. The boycott and/or unreasonable restraint of trade among the defendants and their co-conspirators resulted from an agreement, understanding and concert of action among them to concertedly boycott plaintiffs

and to refuse to consider and approve plaintiffs' application for membership in the NFL.

55. The concerted actions of the defendants had the purpose and effect of subjecting plaintiffs to a group boycott, as is more specifically set forth in paragraphs 62 through 64 of this Complaint, the allegations of which are incorporated herein by reference as if fully set forth, and, therefore, constitute a *per se* violation of §1 of the Sherman Act, 15 U.S.C. §1. The concerted activities of the defendants constitute an unreasonable restraint of trade and, thereby, violate §1 of the Sherman Act, 15 U.S.C. §1, because they have had and will have the effect of restraining free and open competition in the major league professional football market.

56. The defendants' violations of §1 of the Sherman Act, as more specifically set forth in paragraphs 1 through 54 of this Complaint, have severely damaged plaintiffs in their business and property, as is more specifically set forth in paragraphs 65 through 67 of this Complaint, the allegations of which are incorporated herein by reference as if fully set forth, and were directly aimed at excluding plaintiffs from participation in the only major professional football league in existence in the United States and were intended to punish, intimidate and restrain plaintiffs from such participation in light of plaintiffs' prior involvement with the WFL.

COUNT II

57. This Count is brought pursuant to §2 of the Sherman Act, 15 U.S.C. §2, for unlawful attempt and combinations and conspiracy to monopolize interstate trade and commerce in major league professional football throughout the United States. Plaintiffs herein incorporate and reallege paragraphs 1 through 56 of this Complaint, as if fully set forth herein.

58. Defendants and their co-conspirators control trade and commerce in and related to major league professional football in the United States.

59. Beginning at least as early as the Fall of 1975 and continuing up to the present, defendants have engaged in a combination and conspiracy, consisting of a continuing agreement, understanding and concert of action among defendants and their co-conspirators, to maintain complete control over major league professional football activities in the United States, to eliminate all competitors and potential competitors and to punish, intimidate and restrain plaintiffs and all other participants in the WFL from participation in major league professional football.

60. The concerted actions of defendants had the purpose and effect, as is more specifically set forth in paragraphs 62 through 64 of this Complaint, the allegations of which are incorporated herein by reference as if fully set forth, of excluding plaintiffs from participation in major league professional football in the United States and of establishing defendants' monopoly over interstate trade and commerce in major league professional football activities, and were and are intended, *inter alia*, to punish and intimidate plaintiffs for their participation in the WFL. The ultimate aim of the concerted action and conspiracy to monopolize was and is to eliminate plaintiffs' ability to compete in the major league professional football market and to maintain for defendants complete control over and a monopoly position in the entire market of major league professional football in the United States.

61. Defendants' violation of §2 of the Sherman Act, as is more specifically set forth in paragraphs 1 through 60 of this Complaint, has severely damaged plaintiffs in their business and property, as is specifically set forth in paragraphs 65 through 67 of this Complaint, the allegations of which are incorporated herein by reference as if fully set forth, and was directly aimed at punishing and

intimidating plaintiffs and others as a result of their prior participation in the WFL and was designed to maintain for defendants their complete control over and monopoly position in major league professional football in the United States.

PURPOSES AND EFFECTS OF VIOLATIONS ALLEGED IN COUNTS I AND II

62. As is specifically set forth in paragraphs 1 through 61 of this Complaint, the allegations of which are incorporated herein by reference as if fully set forth, the aforesaid acts, combinations, conspiracies, practices, contracts, conduct, concerts of action, practices and devices of defendants had numerous purposes and effects, including, *inter alia*, the following:

(a) Trade and commerce within the major league professional football market was and continues to be unreasonably restrained;

(b) Patrons, sponsors, national and local television and radio networks, municipalities and numerous other persons with interests in major legaue professional football were and continue to be deprived of the benefits of free and open competition in the major league professional football market;

(c) The freedom and ability of plaintiffs to participate in major league professional football and to freely bargain to conduct such activities has been and continues to be unreasonably restrained; and

(d) Professional football players, including, but not limited to, those players who were under contract to plaintiffs, who wish to participate in major league professional football and to freely bargain for their services have been denied such rights and have been and continue to be unreasonably restrained in their professional activities.

63. Furthermore, in effectuating said conspiracy and in carrying out the aforesaid illegal activities, defendants intended to and did commit numerous unlawful acts, including, *inter alia,* the following:

(a) The punishment, intimidation and restraint of businessmen, including plaintiffs, who found and/or participated in the activities of the WFL and who posed an economic and competitive threat to the professional football activities of defendants; and

(b) The punishment, intimidation and restraint of NFL players who had left their employment with the defendant NFL and various defendant member-clubs to play professional football in the WFL.

64. Defendants and their co-conspirators have achieved a monopoly in the major league professional football market in the United States as a result of the acts, conducts, combinations and conspiracies as aforesaid.

DAMAGES INCURRED AS A RESULT OF THE VIOLATIONS ALLEGED IN COUNTS I AND II

65. As a result of defendants' violations of §§1 and 2 of the Sherman Act, as set forth in paragraphs 1 through 64 of this Complaint, the allegations of which are incorporated herein by reference as if fully set forth, plaintiffs have suffered and continue to suffer severe and unreasonable damages due to their inability to participate in mjor league professional football in the United States.

66. Because of the unlawful acts of the defendants, plaintiffs have been damaged, *inter alia,* as follows, which damage is continuing up to and including the date of the filing of this Complaint:

(a) The loss of revenues and future revenues from participation in major league professional football activities;

(b) The loss of profits and future profits from their participation in major league professional football activities, including admission revenues, concession profits, television royalties and contracts and numerous other forms of revenue and profits received by NFL member teams;

(c) The loss of goodwill and business reputation;

(d) The loss of numerous costs and expenses incurred by palintiffs in preparing for and submitting their application for membership to the NFL; and

(e) The loss of capital investment.

67. As a direct and proximate result of defendants' unlawful conduct, plaintiffs have sustained and will sustain in the future damages presently estimated to exceed $48 million dollars ($48,000,000.00) prior to trebling and prior to the inclusion of costs of litigation and reasonable attorney's fee.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for the following relief:

(a) That judgment be entered in favor of plaintiffs and against the defendants, jointly and severally, for threefold the damages plaintiffs have sustained as a result of the defendants wrongful acts;

(b) That defendants be ordered to pay to plaintiffs the costs of this litigation, including any expert witness fees and reasonable attorney's fees, and that judgment be entered in such amounts in favor of

plaintiffs and against defendants, jointly and severally; and

(c) Such other and further relief as may appear necessary and appropriate.

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OF COUNSEL:

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Dated: December 3, 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE MID-SOUTH GRIZZLIES (a Joint Venture); JOHN EDWARD BOSACCO; MID-SOUTH GRIZZLIES (a Limited Partnership); and CONSOLIDATED INDUSTRIES, INC.,	:	Civil Action No. 79-4373
Plaintiffs,	:	
v.	:	
THE NATIONAL FOOTBALL LEAGUE, an unincorporated association, et al.,	:	
Defendants.	:	Jury Trial Demanded

ANSWER OF DEFENDANTS

Defendants, by their undersigned attorneys, answer the complaint herein and allege and aver, as follows:

First Defense

1. Defendants admit that plaintiffs seek to invoke the various antitrust laws referred to in paragraph 1 of the complaint, but deny that any of the defendants have violated the provisions of any antitrust laws or that any plaintiff has suffered any damage as alleged.

2. Defendants admit that subject matter jurisdiction is asserted under 28 U.S.C. §1337.

3. Defendants deny the allegations of this paragraph except that they admit that each of the member clubs of the National Football League (hereinafter "NFL") occasionally has transacted business within the Eastern District of Pennsylvania.

4. Defendants deny the allegations of this paragraph.

5. Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations of this paragraph.

6. Defendants admit that an organization identifying itself as "Mid-South Grizzlies" and representing itself as a Tennessee limited partnership was an applicant during 1975-76 for a franchise in the NFL; aver that the application stated that "Toronto Football", identified in the application as an Ontario limited partnership, was to be the general partner in the Tennessee limited partnership; aver that the application stated that John F. Bassett was to be the chief executive officer of the Tennessee limited partnership; state that defendants are without knowledge or information sufficient to form a belief as to whether said Tennessee limited partnership ever was brought into being or currently exists as a partnership; and deny the remaining allegations of this paragraph.

7. Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations of this paragraph.

8. Defendants admit that the NFL is a non-profit unincorporated association with offices at 410 Park Avenue, New York, New York; admit that defendant NFL exists as an organization to facilitate the presentation of professional football games by its member clubs; admit that the member clubs of the NFL conduct home operations in several cities throughout the United States; admit that the club which owns the NFL franchise for Philadelphia, Pennsylvania, conducts its home operations in the Eastern District of Pennsylvania, and plays professional football games with other member clubs of the NFL within that District; admit, for purposes of this answer only, that the defendant NFL conducts business within the Eastern District of Pennsylvania; and deny the remaining allegations of this paragraph.

9. Defendants admit that Pete Rozelle ("Rozelle") is the Commissioner of the defendant NFL and that the

offices of the NFL are at 410 Park Avenue, New York, New York; and deny the remaining allegations of this paragraph.

10. Defendants admit that with exceptions the named defendants are NFL member clubs; aver that each NFL member club conducts joint-venture professional football operations with other NFL member clubs in accordance with an annual schedule fixed by the NFL and within metropolitan areas determined by the NFL member clubs collectively; and deny the remaining allegations of this paragraph.

11. Defendants deny the allegations of this paragraph, except that they admit that the NFL member club which owns the franchise for Philadelphia, Pennsylvania, is found in, has an agent in, resides and transacts business within, the Eastern District of Pennsylvania.

12. Defendants deny the allegations of this paragraph.

13. Defendants admit that the defendant member clubs purchase equipment and supplies across state lines; admit that defendant member clubs travel across state lines for the presentation of games; admit that the telecasts of NFL games are transmitted and broadcast across state lines; admit that tickets to NFL games are occasionally sold by member clubs across state lines; admit that the conduct of professional football operations by the member clubs involves interstate commerce and that meetings of the member clubs to resolve their common business affairs require travel in interstate commerce; admit that promotional activities are conducted across state lines; and deny the remaining allegations of this paragraph.

14. Defendants admit the allegation of this paragraph.

15. Defendants admit that the NFL is currently the only nationally operating professional football league presenting professional football contests within the

United States; aver that the current position of the NFL as the only nationwide professional football league operating within the United States is the product of a Congressional statute enacted in 1966 (Public Law 89-800 (1966), 15 U.S.C. §1291 (1977)) approving the consolidation of the clubs of the NFL and the former American Football League in an expanded single league and of a decision by the member clubs of the World Football League ("WFL") in 1975 to discontinue the operations of that league; aver that other professional football leagues have, from time to time, operated within the United States; and deny the remaining allegations of this paragraph.

16. Defendants admit that the NFL exists to facilitate the conduct of professional football operations by its member clubs; aver that the authority and duties of the NFL are only those assigned to it by the member clubs of the NFL; aver that the NFL performs various administrative and promotional functions, including the fixing of the annual schedule of games to be participated in by the NFL member clubs; aver that, pursuant to a Federal statute (15 U.S.C. §§1291-1294 (1977)), it acts as agent for the NFL member clubs in periodic negotiations of the sale of member club television rights; and deny the remaining allegations of this paragraph.

17. Defendants admit that the functions performed by the NFL are as set forth in its Constitution and By-Laws, as amended from time to time by the member clubs; admit that the member clubs occasionally appoint various committees and subcommittees to investigate, report, and make recommendations to the member clubs collectively on particular aspects of their joint business affairs; aver that all business decisions involving the member clubs' common business affairs are made by the member clubs under voting procedures established by the NFL's Constitution and By-Laws; aver that neither the NFL nor Rozelle has a vote on NFL business deci-

sions; and deny the remaining allegations of this paragraph.

18. Defendants admit that each NFL member club is regularly assessed for payments sufficient to cover the expenses incurred by defendant NFL; aver that the NFL member clubs have in the past made decisions to enlarge their common operations by extending their joint operations to new cities; aver that the purchasers of expansion franchises are charged fees for the assets contributed by the existing member clubs to the new member club; and deny the remaining allegations of this paragraph.

19. Defendants admit that the NFL member clubs have from time to time voted to extend their joint operations to new cities, and have established new NFL franchises to conduct NFL operations at new locations; admit that, at the time of the events referred to in the complaint, the NFL Constitution and By-Laws provided that expansion of the NFL clubs' joint operations to an additional city required an affirmative vote of three-fourths of the then existing member clubs of the NFL; and deny the remaining allegations of this paragraph.

20. Defendants admit that a professional football league known as the World Football League ("WFL") operated during 1974 and for a portion of the 1975 season; admit that the WFL announced that it was ceasing to operate in October 1975; admit that for the period of the WFL's operations the member clubs of the WFL competed with the member clubs of the NFL for professional football players; admit that the WFL operated with 12 professional football teams in 1974 and with 11 professional football teams for a portion of the 1975 season; aver that they are without knowledge or information sufficient to form a belief as to the truth of the allegation that the WFL was organized in 1973; and deny the remaining allegations of this paragraph.

21-23. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of these paragraphs.

24. Defendants deny the allegations of this paragraph.

25. Defendants admit that no NFL franchise is currently located within the City of Memphis, Tennessee; aver that they are without knowledge or information sufficient to form a belief as to the current population of the States of Tennessee, Mississippi, and Arkansas; and deny the remaining allegations of this paragraph.

26. Defendants admit that professional foodball as conducted by the NFL member clubs is currently the only class of professional football carried on network television or radio and attracting national interest; and deny the remaining allegations of this paragraph.

27. Defendants admit that the NFL is the only professional football league currently operating on a national basis within the United States; and deny the remaining allegations of this paragraph.

28. Defendants admit that the complaint seeks to allege violations of Section 1 of the Sherman Act; deny that defendants, or any of them, have violated the provisions of that Section; and incorporate herein by reference their answers to paragraphs 1 through 27 of the complaint.

29. Defendants deny each of the allegations of this paragraph and of the subparagraphs of this paragraph.

30. Defendants deny the allegations of this paragraph, except that defendants aver that an organization representing itself as a Tennessee limited partnership and identifying itself as the "Memphis Grizzlies" applied in 1975 to become a member club of the NFL.

31. Defendants deny the allegations of this paragraph.

32. Defendants deny each of the allegations of this paragraph and of the subparagraphs of this paragraph, except that defendants admit that in 1975 two former NFL All-Pro players had performed football services for a former WFL franchise (known as the "Memphis Southmen") operating in Memphis, Tennessee; admit

that the head coach of the Memphis Southmen franchise of the WFL later became a head coach of one of the teams of the NFL and is presently director of player personnel of another NFL team; and admit that John Bassett was the former president of the Memphis Southmen franchise.

33. Defendants deny the allegations of this paragraph.

34. Defendants deny the allegations of this paragraph, except that defendants admit that persons connected with the former Memphis Southmen franchise of the WFL communicated to NFL representatives their intention to apply for an NFL franchise and that this expression of intention was communicated to NFL representatives both before and after the President of the WFL publicly announced on October 22, 1975, that the WFL was terminating its operations.

35. Defendants deny the allegations of this paragraph, except that they admit that by letter of November 3, 1975, attorneys for an organization identifying itself as the "Mid-South Grizzlies" notified the NFL Commissioner that they would in the near future submit an application for an NFL franchise to operate in Memphis, Tennessee for the 1976 season.

36. Defendants admit that attorneys for an organization representing itself as a Tennessee limited partnership and identifying itself as the "Mid-South Grizzlies" submitted an application for an NFL franchise by a written application dated November 17, 1975; and deny the remaining allegations of this paragraph.

37. Defendants deny the allegations of this paragraph except that they admit that there was enclosed with the application referred to in this paragraph a certified check payable to the NFL in the amount of $25,000; and aver that this check was promptly returned to the applying organization.

38. Defendants deny the allegations of this paragraph.

39. Defendants admit that representatives of the organization seeking to acquire an NFL franchise conferred with the NFL Expansion Committee on or about December 17, 1975; aver that these representatives were informed by members of the NFL Expansion Committee of the many reasons why the NFL Expansion Committee was unwilling to recommend to the full NFL membership that the NFL add a third expansion franchise to operate during the 1976 season; and deny the remaining allegations of this paragraph.

40. Defendants deny the allegations of this paragraph, except that defendants admit that all of the members of the NFL Expansion Committee, after evaluating the Memphis Grizzlies' proposal, were of the view that the interests of the NFL and its member clubs would not be served by adding three new franchises for the 1976 season or by accepting the Memphis Grizzlies' application for an NFL franchise.

41. Defendants deny the allegations of this paragraph.

42. Defendants admit that at a meeting of the NFL member clubs on January 9, 1976, representatives of an organization identifying itself as the "Memphis Grizzlies" were provided the opportunity to make a presentation to the defendant NFL clubs relating to the application of that organization for an NFL franchise; and deny the remaining allegations of this paragraph.

43. Defendants admit that representatives of an organization identifying itself as the "Memphis Grizzlies" were provided an opportunity to make a further presentation to the NFL member clubs relating to the application of that organization for an NFL franchise and that such presentation was made in San Diego, California, on or about March 17, 1976; and deny the remaining allegations of this paragraph.

44. Defendants admit that on or about March 17, 1976 representatives of an organization identifying itself as the "Memphis Grizzlies" met with the NFL's Execu-

tive Committee; admit that representatives of that organization made a full presentation relative to the application of that organization for an NFL franchise; admit that on or about that date representatives of the organization identifying itself as the Memphis Grizzlies conferred with other representatives of various defendants; and deny the remaining allegations of this paragraph.

45. Defendants admit that on or about March 17, 1976, defendants rejected the application for an NFL franchise by the organization identifying itself as the "Memphis Grizzlies"; admit that on or about that date defendant Rozelle publicly announced that decision by the NFL member clubs; and deny the remaining allegations of this paragraph.

46. Defendants deny the allegations of this paragraph.

47. Defendants admit that representatives of the former Memphis Southmen franchise of the WFL had indicated their intention to submit an application for an NFL franchise to the NFL before October 22, 1975, and that this informal statement of intention was communicated to the NFL while the WFL was still operating as a football league competing with the NFL; aver that representatives of other clubs in the WFL had expressed similar intentions from time to time; aver that the plans of former participants in the WFL to acquire NFL franchises, as communicated to various representatives of the defendants or as publicly announced, were constantly shifting and changing throughout the period from October 1975 through March, 1976; and deny the remaining allegations of this paragraph.

48. Defendants deny the allegations of this paragraph.

49. Defendants admit that in early 1974 the member clubs of the NFL voted to enlarge the League's operations by creating two new NFL franchises to operate in Tampa, Florida, and Seattle, Washington; admit that

these franchises were at that time scheduled to begin active NFL operations beginning in 1976; and deny the remaining allegations of this paragraph.

50. Defendants deny the allegations of this paragraph.

51. Defendants admit that Memphis, Tennessee, was one of a large number of cities evaluated by the NFL clubs in 1973 and 1974 for a two-team expansion in 1976; state that Seattle, Washington, and Tampa, Florida, were at that time determined by the NFL clubs to be more desirable sites for NFL expansion; and deny the remaining allegations of this paragraph.

52. Defendants admit that the individuals selected by the NFL clubs to become owners of the two NFL expansion franchises to operate in Seattle and Tampa had had no ownership involvement with any WFL club; aver that at the time such ownership decisions were arrived at it would have been legally improper for the NFL clubs to have offered ownership positions in NFL clubs to individuals then holding ownership positions in clubs of the WFL; and deny the remaining allegations of this paragraph.

53. Defendants admit that plaintiffs Bosacco and Tatham were publicly identified as having direct or indirect ownership positions with WFL clubs; deny that any of the other named plaintiffs are former owners of WFL teams; admit that clubs of the former WFL competed with NFL clubs for players during the period of the WFL's operations and that, subsequently, certain players who had played for WFL clubs played within the NFL; and state that they are currently without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of this paragraph.

54-56. Defendants deny the allegations of these paragraphs.

57. Defendants admit that the complaint purports to allege a violation of Section 2 of the Sherman Act; deny that any of the defendants have violated the provisions of

that Section; and incorporate herein by reference their answers to paragraphs 1 through 56 of the complaint.

58-61. Defendants deny the allegations of these paragraphs and incorporate herein by reference their answers to paragraphs 1 through 61 of the complaint.

62-63. Defendants deny the allegations of these paragraphs and each of the subparagraphs contained therein.

64-65. Defendants deny the allegations of these paragraphs.

66. Defendants deny the allegations of this paragraph and each of the subparagraphs contained therein.

67. Defendants deny the allegations of this paragraph.

68. Defendants deny each and every allegation of the complaint not specifically answered herein.

Second Defense

The complaint fails to state a claim against these defendants, or any of them, upon which relief can be granted. The NFL clubs are not business or economic competitors of one another but participants in a joint venture enterprise directed at the presentation of a form of entertainment. The entertainment product which they jointly produce is competitive with every other form of entertainment offered in United States.

Expansion of the NFL represents a further subdivision of the joint assets of the existing NFL member clubs, and an NFL member club decision for expansion requires the exercise of business judgment by the NFL member clubs. The failure of the member clubs to grant, on demand, a franchise to the applicant to operate in Memphis, Tennessee, on a schedule proposed by the applicant, had neither an anti-competitive purpose or effect. Such decision was wholly devoid of any anti-competitive consequences, and did not constitute a violation of the Sherman Act.

Third Defense

Collectively and individually, plaintiffs lack any standing to bring this action under the federal antitrust laws, and they lack standing to sue for alleged damages.

Fourth Defense

The decision of the NFL member clubs in 1976 not to add another expansion franchise to the NFL, or to create a new NFL franchise to conduct NFL member club operations in Memphis, Tennessee, was the result of the exercise of business judgment of the NFL member clubs, which judgment was based on valid business considerations. Such a business decision is not actionable under the federal antitrust laws.

Fifth Defense

The defendant NFL member clubs, collectively and individually, have no monopoly of any relevant product in any relevant geographic market within the meaning of Section 2 of the Sherman Act.

Sixth Defense

The NFL's position as the only nationally operating professional football league in the United States at present was the product of a federal statute (Public Law 89-800 (1966), 15 U.S.C. §§1291-1294 (1977)) specifically authorizing the establishment of such a football league.

Seventh Defense

Plaintiffs sought to join the defendant NFL not to compete with it. Plaintiffs charge the NFL with an unlawful "monopoly" in 1976 of professional football operations, but plaintiffs are barred from recovering damages under the antitrust laws, even if plaintiffs' charges were correct, based on the denial of an alleged right to partici-

pate in such alleged unlawful "monopoly." On plaintiffs' allegations, the NFL's creation of an expansion NFL franchise to operate a football team in Memphis, Tennessee would have represented but an extension of the NFL's "monopoly," would have established plaintiffs as a participating member of such "monopoly," and would have resulted in plaintiffs' acquisition of a "monopoly" of professional football operations in the Memphis, Tennessee area. Such activities do not give plaintiffs a cause of action under the federal antitrust laws.

Eighth Defense

The Court lacks jurisdiction over the person of defendant Rozelle.

Ninth Defense

Because of the insufficiency of service of process, the Court lacks jurisdiction over the person of defendants.

Tenth Defense

Plaintiffs' claims are barred by laches and by the statute of limitations.

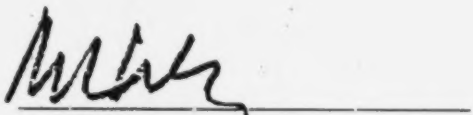
Eleventh Defense

Plaintiffs' claims are barred by waiver and estoppel.

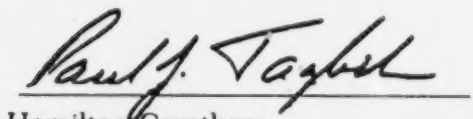
Denial of Plaintiffs' Prayer for Relief

Defendants, and each of them, deny that any defendant has engaged in any violation of law and that plaintiffs, or any of them, are entitled to judgment, or to the costs of this litigation, or to attorneys' fees or to any form of relief.

WHEREFORE, the defendants pray that the complaint be dismissed with prejudice and with costs awarded to defendants.



Edwin P. Rome
Morris L. Weisberg
Blank, Rome, Comisky & McCauley
Four Penn Center Plaza
Philadelphia, Pennsylvania 19103



Hamilton Carothers
James C. McKay
Paul J. Tagliabue
Covington & Burling
888 16th Street, N.W.
Washington, D.C. 20006
Attorneys for Defendants

Dated: February 13, 1980

EXHIBIT "B"

20 August 1981

The Honorable Joseph L. McGlynn, Jr.
United States Courthouse
Room 8614
601 Market Street
Philadelphia, PA 19106

Re: *Mid-South Grizzlies Ltd., et al. v. NFL, et al.*
(E.D. Pa. Civ. No. 79-4373)

Dear Judge McGlynn:

On 12 August 1981, at oral argument on defendants' motion for summary judgment, Mr. Rubenstone advanced the argument that under some circumstances, and applying objective, rational and fair decisional criteria, defendants might legitimately, collectively refuse to deal with a potential competitor demanding entry to the professional football marketplace. As an example, Mr. Rubenstone posited a fully qualified applicant for an NFL franchise, who insisted on locating his/her team in Guam and forcing the existing professional football enterprises to travel to Guam to play games with his/her team. Your Honor asked what the result in a subsequent antitrust lawsuit by such an applicant, denied a franchise, would be if in fact the NFL had neither had nor applied any objective, rational and fair standards governing their exclusion of such a prospective market entrant from the marketplace. Mr. Rubenstone indicated that he did not then know the answer and would like to think about it.

The answer to your Honor's question is found in *Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S. Ct. 1246 (1963). Silver had been a stockbroker, but had not been a member of the Exchange. Under the Exchange' rules, members were permitted to establish private wire communications with non-members. With the Ex-

change' permission, Silver had such wire connections with a New York member. This permission was withdrawn without notice or hearing, and Silver was excluded from the marketplace. On his subsequent antitrust lawsuit alleging a collective boycott, the Exchange argued that congressional policy evinced by the Securities Exchange Act justified the Exchange' collective self regulation both of its operations and of the marketplace.

In his opinion for the Court, Mr. Justice Goldberg framed the issued as whether the Congress, through the Securities Exchange Act, had "created a duty of exchange self-regulation so pervasive as to constitute an implied repealer of our antitrust laws". The Court held that such self-regulation was "justified in response to antitrust charges only to the extent necessary to protect the achievement of the aims of the Securities Exchange Act". Thus, the exclusion of Silver from the marketplace, which ordinarily would have constituted an illegal boycott, might be exempt from the antitrust laws as a result of the congressionally created duty of self-regulation imposed on the Exchange, *but only if fair procedures had been followed*, including notice and hearing.

Mr. Justice Goldberg continued:

> The point is not that the antitrust laws impose the requirement of notice and a hearing here, but rather that, in acting without according petitioners these safeguards in response to their request, the Exchange has plainly exceeded the scope of its authority under the Securities Exchange Act to engage in self-regulation and therefore has not even reached the threshold of justification under that statute for what would otherwise be an antitrust violation. *Since it is perfectly clear that the Exchange can offer no justification* under the Securities Exchange Act *for its collective action* in denying petitioners

> the private wire connections *without notice and an opportunity for hearing*, and that the Exchange has therefore violated §1 of the Sherman Act, 15 U.S.C. §1, and is thus liable to petitioners under §§4 and 16 of the Clayton Act, 15 U.S.C. §§15, 26, *there is no occasion for us to pass upon the sufficiency of the reasons which the Exchange later assigned for its action*. Thus there is also no need for us to define further whether the interposing of a substantive justification in an antitrust suit brought to challenge a particular enforcement of the rules on its merits is to be governed by a standard of arbitrariness, good faith, reasonableness, or some other measure. It will be time enough to deal with that problem if and when the occasion arises. Experience teaches, however, that the affording of procedural safeguards, which by their nature serve to illuminate the underlying facts, in itself often operates to prevent erroneous decisions on the merits from occurring.

(emphasis supplied).

Thus, the answer to Your Honor's question is clear. Even where the duty of industry self-regulation is manifest in affirmative congressional enactments, there is no necessity for nor justification of exclusion of prospective market entrants from the marketplace without the application of fair, objective, rational standards governing the exclusionary decision and without notice and meaningful opportunity to be heard on the question. By their very actions without such standards, notice and opportunity, antitrust defendants violate the antitrust laws and there is no occasion to inquire of the sufficiency of the reasons

which they may later attempt to assign in justification of their actions.

Sincerely,

STEVE ALEXANDER
Counsel for Plaintiffs

SA/bab
Ref. No. 81-133SA
cc: The Clerk of the Eastern District of Pennsylvania
(for filing)
James C. McKay, *Esquire*
Morris Weisberg, *Esquire*

September 10, 1981

The Honorable Joseph L. McGlynn, Jr.
United States Courthouse
Room 8614
601 Market Street
Philadelphia, PA 19106

Re: Mid-South Grizzlies Ltd., et al. v. NFL, et al.
(E.D. Pa. Civ. No. 79-4373)

Dear Judge McGlynn:

This will respond to yesterday's request from your chambers. Since the Court's order of 13 August 1981, the following developments of record have occurred.

1. Plaintiffs responded by letter dated 20 August 1981 to a question put by the Court to Mr. Rubenstone during oral argument, the answer to which Mr. Rubenstone did not have at the time.

2. By letter dated 20 August 1981, plaintiffs renewed their demands for answers to interrogatories and production of documents, which demands both were pressed upon the Court in plaintiffs' motion to compel dated 12 December 1980, and are, in plaintiffs' view, encompassed by the Court's order of 13 August. The letter of 20 Aguust enumerated the specific interrogatories and requests for production, a response to which plaintiffs believe is proper and necessary to completion of the discovery allowed plaintiffs by the Court's order.

3. On 21 August 1981, plaintiffs filed a motion (with proposed order and supporting memorandum) for accelerated discovery. This motion requested that the Court order that defendants provide the discovery requested in plaintiffs' letter of 20 August within 15 days of the date of service of the letter. Attached to the motion as Exhibit "A" was a copy of the letter demand.

4. Under cover of a letter to the Court dated 26 August 1981, local counsel for defendants filed a formal opposition to plaintiffs' motion for accelerated discovery. Attached as an exhibit to the formal opposition was a letter to plaintiffs' counsel explaining the unavailability of Washington, D.C. co-counsel. In the cover letter to the Court, defendants' local counsel intimated that plaintiffs' renewal of their earlier interrogatories and requests for production would be resisted as not within the reach of the Court's order of 13 August, but promised nevertheless that the parties could stipulate to all appropriate discovery and the Court need not be troubled.

5. On 4 September 1981, defendants filed a supplemental opposition to plaintiffs' motion for accelerated discovery, stating that *defendants* had determined that only two of plaintiffs' renewed discovery requests are encompassed by the Court's order of 13 August, and those only to a limited extent. Lumping all other renewed requests together, without particularization or specification, defendants insisted that either they had already provided the information covered by the Court's order or

the requests exceed the scope of the order. Defendants promised delivery of that minimal information which they are willing to provide "as expeditiously as possible".

6. On 2 September 1981, plaintiffs filed, and served upon defendants, plaintiffs' (new) fourth request for production of documents. Each request enumerated therein falls specifically within the scope of the Court's order of 13 August.

7. Also on 2 September 1981, plaintiffs filed a second motion for accelerated discovery (with proposed order and supporting memorandum) requesting that defendants be ordered to respond to the fourth request for production within 15 days of its service upon them. To date, defendants have responded neither to the requests nor to the motion.

For the Court's convenience, a copy of each of the above enumerated documents is enclosed herewith. As requested, two proposed orders which will grant the discovery to which plaintiffs believe they are entitled, within a time frame to be set by the Court, are also enclosed. These are the proposed orders which accompanied the two motions for accelerated discovery; they will be found attached at the back of each motion enclosed herewith.

Plaintiffs wish to take this opportunity to assert with renewed vigor their position that they are absolutely entitled to and must be afforded the discovery requested above. The relevance of the items requested in plaintiffs' letter-demand is argued in plaintiffs' motion to compel discovery dated 12 December 1980, still pending before the Court. Defendants' generalized response that these discovery demands are either already satisfied or beyond the scope of the Court's order of 13 August is insufficient and entirely unacceptable. Defendants must be required to state with particularity whether they have any information or documents responsive to each such request, whether, for each such request, all such information has been provided or all or part is being withheld, and upon

what rational basis responsive information is being withheld. Only then will the Court be in an informed position from which to make a ruling as to each of plaintiffs' separately enumerated discovery demands. Plaintiffs respectfully request oral argument before the Court denies the relevance of any of these renewed requests.

As to plaintiffs' fourth request for production of documents, each demand for documents enumerated therein was specifically devised by plaintiffs to seek information bearing directly on the issues explored and debated in oral argument on defendants' motion for summary judgment. Particular emphasis was placed on the questions of competition among the defendants *inter se* and the competitive effect which plaintiffs' continued presence in Memphis could have had. Judging from defendants' prior response to related discovery demands, plaintiffs anticipate blanket resistence to their fourth request for production. In that event, plaintiffs respectfully request that the Court require defendants to enumerate, for each document request and with particularity, whether they possess responsive documents, whether any or all such documents have been provided or are being withheld, and the rational basis upon which any responsive document is being withheld. Plaintiffs will then be in a position to argue with particularity the relevance and necessity of any withheld documents. Plaintiffs respectfully request oral argument before the Court denies any request contained in plaintiffs' fourth request for production of documents.

I trust that this letter will clarify plaintiffs' position, and that the enclosed copies of the documents filed of record since the Court's order of 13 August will serve the Court's convenience. I should be pleased to provide any further assistance which the Court may desire.

Sincerely,

STEVE ALEXANDER

SA/bab
Ref. No. 81-149SA

Enclosures
cc: Morris L. Weisberg, *Esquire*
James C. McKay, *Esquire*

bcc: Professor Louis Schwartz
John E. Bosacco, *Esquire*
John Bassett
William Tatham

EXHIBIT "C"

September 16, 1981

Honorable Joseph L. McGlynn
8614 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Re: Mid-South Grizzlies v. N.F.L. Civil Action No. 79-4373

Dear Judge McGlynn:

Although plaintiffs, as expressed previously in our briefs and at oral argument, do not concede that summary judgment proceedings are appropriate at this point in this case and believe that they have a right to conduct full and complete discovery of defendants in preparation for trial of this case, Your Honor has, in connection with defendants' filing of a motion for summary judgment, issued an Order, dated August 13, 1981, which defines certain areas of discovery and sets a discovery cut-off date of October 31, 1981.

Upon review of the transcript of the oral argument held in the above matter on defendants' motion for summary judgment, the Court's questioning of counsel during that proceeding, review of the Court's Order, and after further reflection, it has occurred to plaintiff's counsel that Your Honor may have intended, by your Order, to focus the parties' attention, at this time, solely upon the issue of whether fair, objective, and articulated standards were applied by the defendants in passing upon plaintiffs' application for membership in the NFL, whether such standards existed at that time, and whether any substantive consideration, based upon such standards, was ever given to plaintiffs' application by the defendants. If so, the focus at this stage of the proceeding, would be upon this somewhat narrower issue as distinct from the broader and far more difficult

questions raised under the requisite Rule of Reason analysis, involving, for example, the prevailing conditions in the industry, the impact of defendants' conduct on competition, and the propriety of the business judgments employed by the defendants in their exclusion of a qualified competitor from the industry. Although plaintiffs believe that these business judgment and competition issues must ultimately be reached, it would appear that Your Honor has determined that an initial determination on the objective criteria issue is appropriate.

If Your Honor intended to so limit the scope of this proceeding, in doing so, to accept as true, for the purposes of this motion, the remaining allegations of plaintiffs' Complaint, and to delay consideration of the broader "Rule of Reason" issues to a subsequent point in the proceedings, much of the controversy which has resulted from plaintiffs' discovery requests filed subsequent to the Court's Order may be avoided.

The discovery requests now pending were designed to address, in great part, the broader issues in the suit which are essential to any final resolution of this case. This discovery was not confined to the more limited issues raised by the objective standards question. If, in fact, it was the Court's intention to focus only on the objective criteria question at this time, and to accept the remaining allegations in plaintiffs' Complaint as true for the purpose of this motion proceeding, the scope of discovery can be substantially limited without waiving our position, many of the pending discovery requests can be withdrawn, subject to renewal at a later point in the proceedings, and more specific discovery, written and oral, focused on the objective criteria question, can surely proceed without further intervention by the Court. Plaintiffs are confident that, if the issues are so defined, an accord as to the scope of this discovery can be easily reached with defendants' counsel.

If the Court is in agreement with the above, plaintiffs' counsel stand ready to promptly meet with defense counsel, either alone or with the Court, for the purpose of reaching agreement on the scope of discovery and establishing a deposition schedule. Furthermore, plaintiffs' counsel feel confident that all discovery on this more limited issue can be completed by or shortly after the October 31, 1981 date set by the Court in its Order.

Of course, should Your Honor feel that a conference would be appropriate to discuss the matters raised herein, I will make myself available at the Court's convenience.

Respectfully,

EDWARD H. RUBENSTONE

EHR/ejw
cc: James C. McKay, *Esq.*
Morris L. Weisberg, *Esq.*

EXHIBIT "D"

September 18, 1981

Edward H. Rubenstone, *Esquire*
SPRAGUE & RUBENSTONE
Suite 400
The Wellington Building
135 S. 19th Street
Philadelphia, Pa. 19103

Re: Mid-South Grizzlies v. NFL, et al.
Civil Action No. 79-4373

Dear Mr. Rubenstone:

Thank you for your letter of September 16, 1981. Your assumptions concerning the rationale underlying my order dated August 31, 1981 are correct.

On August 12, 1981, at oral argument on defendants' motion for summary judgment, you stated "that under some circumstances, and applying objective, rational and fair decisional criteria, defendants might legitimately, collectively refuse to deal with a potential competitor demanding entry to the professional football market place." (See Mr. Alexander's letter of August 20, 1981 to the Court; Transcript of Oral Argument at 30-31, 41-42, 54-57). At the time of this oral argument, plaintiffs had outstanding requests for voluminous documents and answers to numerous interrogatories, which defendants refused to answer on the ground, *inter alia*, that compliance would be unduly burdensome.

In an effort to spare all parties the time and expense of what may prove to be unnecessary discovery proceedings, I entered my order of August 13th, which limited discovery at this stage of the litigation "solely to matters relating to the NFL's decision not to grant the plaintiffs an NFL franchise at Memphis, Tennessee and to the NFL's prior practices and standards with respect to the admission of new franchises into the league since the

merger of the NFL and the American Football League". If discovery in this discrete area should reveal that the NFL applied objective standards to the plaintiffs' application, there may not be a need to conduct further discovery.

I assume it will not be necessary at this time for the Court to rule on the pending motions regarding plaintiffs' outstanding discovery requests since you stated in your letter that you will be able to reach an accord with defendants' counsel regarding these requests. I wish to emphasize, however, that I expect all discovery in the areas prescribed by my order of August 13th be completed by October 31, 1981, and that the briefing schedule set forth in that order be adhered to by all the parties.

Very truly yours,

JOSEPH L. MCGLYNN, JR.

JLMcGjr/mmf

cc: Morris L. Weisberg, *Esquire*
James C. McKay, *Esquire*

EXHIBIT "E"

September 23, 1981

BY HAND
Honorable Joseph L. McGlynn, Jr.
Room 8614 United States Courthouse
601 Market Street
Philadelphia, PA 19106

RE: Mid-South Grizzlies, et al. v. The National Football League, et al., C.A. No. 79-4373

Dear Judge McGlynn:

Mr. McKay and I have received your September 18 letter to Mr. Rubenstone, confirming that discovery will currently be limited to the subjects identified in the Court's Order of August 13 and that such discovery will be completed by October 31, 1981. As we have previously made clear, defendants regard discovery on the terms specified by the Court to be appropriate, and we believe that broader discovery is unwarranted.

At the same time, we wish to reiterate the NFL's strong disagreement with plaintiffs' contention, as asserted most recently in Mr. Rubenstone's September 16 letter, that "broader and far more difficult questions" are raised under the antitrust Rule of Reason unless the NFL demonstrates that it applied "objective standards" in deciding not to enlarge its operations with an additional team in Memphis in 1976. As defendants' briefs demonstrate, they are entitled to summary judgment on *several* grounds that would obviate any need ever to reach a Rule of Reason issue here, including defendants' position that the NFL acted as a single business enterprise in deciding not to enlarge the League's operations to Memphis.[1]

---

1. We also know of no authority for Mr. Rubenstone's assertion that on a motion for summary judgment all of the allegations of a complaint are to be accepted as true. As we have previously noted,

As a business organization, the NFL is entitled to make business decisions for reasons regarded as appropriate by its executive board. The antitrust laws do not compel boards of directors or executive committees to function with pre-established, published "objective criteria." Mr. Rubenstone's suggestion that the antitrust laws require "fair . . . articulated" standards is precisely the type of unfounded contention that this Court has rejected as an unsupportable " 'commercial due process' theory of violation of the antitrust laws." *Mogul v. General Motors Corporation*, 391 F. Supp. 1305 (E.D.Pa. 1975), *aff'd mem.*, 527 F.2d 645 (3d Cir. 1976). The antitrust laws simply are not designed to serve as a federal tort law, purporting "to afford remedies" for all wrongs that a plaintiff believes to have occurred in interstate commerce. *Hunt v. Crumboch*, 325 U.S. 821, 826 (1945). In short, while the NFL's decision clearly rested on sound business reasons, we cannot acquiesce in plaintiffs' suggestion that an antitrust defendant carries the burden of proof in that regard.

Finally, with respect to the antitrust principles pertinent to the NFL's motion for summary judgment, we wish to draw Your Honor's attention to the Third Circuit's recent decision in *Fleer Corporation v. Topps Chewing Gum, Inc.*, [1981-2 Trade Cas. ¶64,249, at page 74,040] (Aug. 25, 1981) (copy enclosed). The Court of Appeals there held that a unilateral decision of the executive board of an association (the major league baseball players organization) to decline to license or trade with a third party cannot violate Section 1 of the Sherman Act even if it deprives a party of a business opportunity. *Id.* at pages 74,051-52, paras. 50-52. Similarly, the unilateral decision of the NFL's Executive Committee not to un-

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NOTE — *(Continued)*

the settled law is to the contrary. F.R.Civ.P. 56(e); *Adickes v. Kress & Co.*, 398 U.S. 144 (1970); *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968).

dertake a hasty, ill-considered expansion of the League's operations presents no antitrust issue.

Very respectfully,

MORRIS L. WEISBERG

MLW:vm
Enclosure
cc: Edward H. Rubenstone, *Esquire*
[with enclosure]

EXHIBIT "F"

4 December 1981

The Honorable Joseph L. McGlynn, Jr.
United States Courthouse
Room 8614
601 Market Street
Philadelphia, PA 19106

Re: *Mid-South Grizzlies v. NFL* (E.D. Pa. Civ. No. 79-4373JLM)

Dear Judge McGlynn:

As Your Honor will recall, defendants filed a motion for summary judgment in this case. based on the tripartite argument:

> (1) that as a matter of law, defendants are not economic competitors inter se, but are a single economic entity (in the nature of a "partnership") incapable of conspiring under Section 1 of the Sherman Act, and their decision as a "partnership" not to admit a new "partner" lies outside the purview of Section 2;
>
> (2) that defendants had reasonable business justifications for determining in the first event not to "expand" their "partnership's" operations at all, irrespective of the applicant's substantive merits; and
>
> (3) that in any event, plaintiffs' application was substantially deficient because it failed to comply with several "rules" and "policies" of defendants, which failures would have justified defendants' rejection of it had they wished to expand at all.

After oral argument on 12 August 1981, the Court apparently denied defendants' motion, with leave to file a new motion upon the completion of specified, limited discovery. Memorandum Order, dated 13 August 1981.

The Court's intent was clarified in an exchange of correspondence between plaintiffs' counsel (letter from Mr. Rubenstone to the Court, dated 16 September 1981) and Your Honor's (letter from the Court to Mr. Rubenstone, dated 18 September 1981). Discovery was expressly limited to issues bearing directly on defendants' argument number (3) supra. The Court permitted plaintiffs to depose only the 4 members of the NFL's 1973 Expansion Committee and the NFL's Commissioner, Pete Rozelle.

The test for deciding any renewed motion by defendants for summary judgment was narrowed to

> whether fair, objective, and articulated standards were applied by the Defendants in passing upon Plaintiffs' application for membership in the NFL; whether such standards existed at that time; and whether any substantive consideration, based upon such standards, was ever given to Plaintiffs' application by the Defendants.

Letter from Mr. Rubenstone to the Court, dated 16 September 1981. The Court confirmed this narrowing of the issues by its reply, dated 18 September 1981, and by holding in abeyance plaintiffs' fourth request for production of documents and plaintiffs' renewal of numerous prior interrogatories, all of which sought discovery of facts relevant to defendants' arguments numbers (1) and (2) supra. By vigilantly attempting to confine the conduct of the depositions to areas of inquiry related to the test quoted above, counsel on both sides further confirmed this narrowing of the issues.

Your Honor will recall that at the oral argument had on 12 August 1981, on defendants' first motion for summary judgment, plaintiffs strenuously argued that summary judgment at that time, on that record, was premature. Plaintiffs had had no opportunity to cross-examine defendants' affiants by taking their depositions, and further, numerous interrogatories and requests for produc-

tion of documents, addressed to defendants and relevant to defendants' tripartite argument on summary judgment, were still pending before the Court on plaintiffs' motion to compel discovery. After oral argument, and focusing the parties' attention on the issue of objective standards, Your Honor continued to hold plaintiffs' motion to compel in abeyance, allowing instead only the limited discovery described above. Letter from the Court, supra, at 2.

Thus, by apparently denying defendants' original motion for summary judgment with leave to file and brief another, after this limited discovery, the Court appears to have limited the arguments upon which such a second motion could be based to defendants' argument number (3) supra (objective standards for rejection). In so doing, the Court appears at least implicitly and preliminarily to have ruled against defendants on their argument number (1) supra (single economic entity defense), and to have recognized that defendants' argument number (2) supra is necessarily a question for the trier of fact, involving, as it does, questions of motive, intent and reasonable judgment. *See* Letter from Mr. Rubenstone, supra, at 1-2; Letter from the Court, supra, at 1.

The purpose of this letter is to suggest that the parties can be spared the ordeal of the impending round of elaborate briefing, and that the Court can be spared the necessity of reviewing the briefs, holding oral argument and issuing a written opinion, on the narrow issue of the existence and application of objective standards governing defendants' rejection of plaintiffs' complaint. It is painfully obvious from the recent depositions that there indeed exist real disputes about the material facts upon which defendants' argument number (3) supra and the issue of objective standards are based. The testimony of Pete Rozelle and the members of the NFL's 1973 Expansion Committee conclusively establishes that the question of whether fair, objective and articulate stand-

ards, *even existed*, let alone whether such were applied to plaintiffs' application, cannot be determined in a summary judgment procedure. Indeed, the deponents themselves offered varying and inconsistent testimony about the very issues which we here claim to be indisputably triable.

Although counsel for defendants can reasonably be expected to advocate defendants' cause, it appears from the record now developed that reasonable men could not disagree that even the narrow issue of objective standards will have to be resolved by the trier of fact. We are now convinced that plaintiffs can and will successfully establish that in fact *no* objective standards were ever applied by defendants in connection with *any* "expansion" decision made by them. Even though we do not expect defendants' counsel to agree with us, we have no reason not to expect defendants' counsel to be forthright in conceding, at the minimum, that the recent discovery demonstrates beyond peradventure the existence of triable questions of fact on these issues.

In short, despite defendants' earlier position and in light of the subsequent discovery, we believe that even defendants should concede that the record patently precludes summary judgment by the Court on the subject of their impending motion, the existence of and application to plaintiffs of fair, objective decisional standards.

If we are correct in this belief, the most expeditious disposition of this issue will be achieved by defendants' counsel now candidly acknowledging to the Court the existence of disputed, material facts concerning their argument number (3) supra. If we are incorrect and defendants' counsel will not now so concede, we respectfully suggest that the Court could most expeditiously dispose of this issue by scheduling a briefing conference in chambers. At the conference, we and defendants' counsel could orally and openly examine and discuss with the Court the recent deposition testimony. Counsel for both sides can, of course, be expected to make honest

representations of fact concerning the deponents' testimony, differing only in counsel's respective interpretations of the import of the testimony.

The Court could then decide, on the basis of this exposure to the record, whether the Court actually needs defendants' proposed second motion for summary judgment and the extensive briefs now looming on the horizon. If the Court should agree with us that the testimony presents, at the minimum, triable questions of material fact, then the most expeditious disposition and the most judicious use of the Court's time would be to avoid a second defense motion for summary judgment at this time, and to proceed instead with the development of the case. Only if the Court should disagree with us, then in order to develop a full record in support of the Court's view and for appellate review, would it be necessary for the parties to brief and argue the defendants' proposed second motion, and for the Court to issue a written opinion.

For the Court's convenience, I include with this letter a copy of each of: (1) the Court's opinion and order, dated 13 August 1981; (2) the letter from Mr. Rubenstone to the Court, dated 16 September 1981; (3) the letter from the Court to Mr. Rubenstone, dated 18 September 1981; and (4) the letter from Mr. Weisberg to The Court, dated 23 September 1981.

Respectfully,

SPRAGUE & RUBENSTONE

By: _____
STEVE ALEXANDER

Counsel for Plaintiffs

SA/bab
Ref. No. 81-208SA

Enclosures

cc: HAMILTON CAROTHERS, *Esq.*
JAMES C. MCKAY, *Esq.*
PAUL J. TAGLIABUE, *Esq.*
EDWIN P. ROME, *Esq.*
MORRIS L. WEISBERG, *Esq.*
GARY GREEN, *Esq.*

bcc: Professor LOUIS B. SCHWARTZ
JOHN E. BOSACCO, *Esquire*
JOHN F. BASSETT
WILLIAM R. TATHAM

EXHIBIT "G"

December 10, 1981

BY HAND

Honorable Joseph L. McGlynn, Jr.
Room 8614 U.S. Courthouse
601 Market Street
Philadelphia, PA

RE: Mid-South Grizzlies, et al. v. National Football League, et al., Civil Action No. 79-4373

Dear Judge McGlynn:

Defense counsel has had a brief opportunity to review Mr. Alexander's unusual letter to the Court dated December 4, 1981. We do not think it appropriate to argue the content of that letter by further correspondence, although we obviously differ with the statements Mr. Alexander has submitted. Defendants shall, in accordance with the permission and the direction of the Court, file a renewed motion for summary judgment and a brief in support thereof by December 21, 1981.

Respectfully,

EDWIN P. ROME

EPR:vm
cc: All Counsel

EXHIBIT "H"

December 15, 1981

File No. 81-1308

Honorable Joseph L. McGlynn, Jr.
United States Courthouse
601 Market Street, Rm. 8614
Philadelphia, PA 19106

Re: Mid-South Grizzlies v. NFL
(E.D. Pa. Civ. No. 79-4373JLM)

Dear Judge McGlynn:

On December 4, 1981, Mr. Alexander, of Sprague & Rubenstone, our co-counsel in this case, alerted your Honor to Plaintiffs' belief that a substantial amount of the Court's and counsel's work may be avoided in connection with Defendants' renewal of their Motion for Summary Judgment.

In his letter, he requested a conference in the event that Defendants' counsel disagreed with Plaintiffs' position.

We since have received a copy of a letter dated December 10, 1981 sent to your Honor by Edwin P. Rome, Esquire, one of Defendants' lawyers. Unfortunately, Mr. Rome declined to address the points Plaintiffs raised in Mr. Alexander's letter, and instead stated that Defendants still intended to file their renewed Motion for Summary Judgment.

The question of whether Defendants have the right to file their renewed Motion is not the issue. They have that right even if it is for the purpose of merely protecting the record. The real issue is whether the case, as it has developed, should be stalled in the quagmire of Defendants' renewed Motion for Summary Judgment, with all discovery suspended, and the Court and Plaintiffs having to devote substantial resources to a renewed

Motion which, on its face, appears to a certainty to be unfounded.

Federal Rule of Civil Procedure One states that the Rules are to be construed to secure the just, speedy and inexpensive determination of every action. Defendants are proposing to elongate and protract the proceeding with a renewed Motion which appears to be totally unnecessary.

Accordingly, we urge the Court to schedule an immediate conference, at which time we may be able to convince the Court that other than to protect the record, Defendants' Motion is superfluous and that a comprehensive reply by Plaintiffs is not needed. At the same time, the Court might lift the existing ban on discovery and allow the case to progress to the next step.

Respectfully yours,

SPRAGUE & RUBENSTONE
and
SIDKOFF, PINCUS, GREENBERG & GREEN

By: _____
GARY GREEN

Counsel for Plaintiffs

GG:pau

Enclosures

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EXHIBIT "I"

December 17, 1981

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Re: Mid-South Grizzlies v. NFL, et al
Civil Action No. 79-4373

Gentlemen:

Thank you for the suggestions in your recent letters to the court. I appreciate your desire to conserve the resources of the lawyers, the litigants and the court.

It seems to me, however, that the best way to accomplish this objective is to adhere to my prior determination to dispose of the defendants' motion for summary judgment because if it is undisputed that the defendants used "objective, rational and fair decisional criteria" in rejecting plaintiff's application, then that may well be the end of the litigation ball game.

Very truly yours,

JOSEPH L. MCGLYNN, JR.

JLMcGjr/nz

cc: Edwin P. Rome, *Esquire*
Morris L. Weisberg, *Esquire*

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No. 83-1470

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE MID-SOUTH GRIZZLIES, *et al.*,
Petitioners,

v.

THE NATIONAL FOOTBALL LEAGUE, *et al.*,
Respondents.

BRIEF OF RESPONDENTS NATIONAL FOOTBALL LEAGUE, *ET AL.*, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a decision by the members of the National Football League not to expand their joint business operations to include an additional League team in a community not presently represented constitutes a violation of either Section 1 or Section 2 of the Sherman Act.

COUNTERSTATEMENT OF THE CASE

One of the petitioners operated a member club of the World Football League in Memphis for the 1974 season and a portion of the 1975 season. When the World Football League discontinued its operations in late 1975, petitioners reorganized that club and demanded that they promptly be granted a

franchise to operate a National Football League ("NFL") club in Memphis. At that time, the NFL was in the final stages of almost three years of planning for the creation of two new franchises in 1976 in Seattle and Tampa Bay. Nevertheless, the League promptly arranged for petitioners to meet with its Expansion Committee (in December 1975), with other League representatives, and with the NFL's entire membership (in January 1976). A-38-39; 550 F. Supp. at 560-61.[1] Petitioners thus had a full opportunity to persuade the NFL member clubs that the League should—without pre-planning—engage in the kind of large-scale expansion that had negatively affected other sports leagues. A-55; 550 F. Supp. at 568.

On the Expansion Committee's recommendation that further enlargement of the NFL was then unwarranted, the NFL's Executive Committee concluded in March 1976 that such further expansion would be unprecedented and precipitous, that serious labor-management disputes and other severe operating problems first had to be resolved, and that the proposed expansion to Memphis (which would have required the addition of another NFL club as well) was contrary to the NFL's best interests. A-39-40, 45; 550 F. Supp. at 561, 563-64. Petitioners were promptly advised of the NFL's decision.

Nearly four years later, in December of 1979, petitioners commenced this action, claiming that the decision not to enlarge the League to include a Memphis member club constituted a violation of both Section 1 and Section 2 of the Sherman Act. A-89-111. Petitioners made no claim that the NFL was in any way responsible for the demise of the World Football League.

After both sides had engaged in considerable discovery, the NFL moved for summary judgment on the ground that petitioners had not shown and could not show any restraint on commercial competition—a requisite element of a Sherman Act

[1] The District Court's opinion is reported at 550 F. Supp. 558 (E.D. Pa. 1982). The opinion of the Third Circuit is reported at 720 F.2d 772 (3d Cir. 1983).

violation. After full briefing and argument, the District Court denied the NFL's motion without prejudice to renewal and directed petitioners to address further discovery to the NFL's decision not to grant petitioners' franchise application and to the NFL's prior practices and standards with respect to League expansion decisions. A-11, 48; 720 F.2d at 777; 550 F. Supp. at 565. When that discovery was concluded, the NFL renewed its motion for summary judgment, which the District Court granted on the ground that the League's action had not restrained commercial competition in any manner.

The District Court found that petitioners were not competitors of the NFL or its member clubs and were not "injured by any anticompetitive behavior of defendants" (A-55; 550 F. Supp. at 568); that the NFL had "substantial business reasons not to plan any further expansion" when petitioners had applied (*Id.*); that petitioners' primary objective was to participate with the other NFL teams in the joint production of NFL football and to share fully in the proceeds earned by the NFL's members, not to engage in competition with the members; and that "the denial upon demand of a new National Football League franchise to a qualified person does not run afoul of the antitrust laws." A-62; 550 F. Supp. at 572.

The Court of Appeals, in a comprehensive opinion (A-1-31), affirmed the decision of the District Court as to petitioners' claims under both Sections 1 and 2 of the Sherman Act, and also rejected petitioners' contention that it should have been allowed further discovery and a trial on asserted factual issues. In rejecting this contention, the Court of Appeals considered each of the factual issues asserted by petitioners and found that none was relevant to the establishment of a restraint on commercial competition, the absence of which was fatal to petitioners' contention.

REASONS FOR DENYING THE WRIT

The Third Circuit's decision, which carefully reviewed and unanimously rejected petitioners' legal and factual claims, rests on settled antitrust principles, is clearly correct, and does not present any issue that warrants further review by this Court.

I. THE THIRD CIRCUIT CORRECTLY RULED THAT THE DECISION OF THE NATIONAL FOOTBALL LEAGUE NOT TO EXPAND THE LEAGUE'S OPERATIONS RESTRAINED NO COMMERCIAL COMPETITION

The Sherman Act prohibits conduct that unreasonably restrains competition; Section 1 applies to concerted action by competitors and Section 2 to single firm conduct. The essential ingredient, however, of every Sherman Act violation is a restraint on commercial competition. *Brown Shoe Co., Inc.* v. *United States*, 370 U.S. 294, 320 (1962); *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). The courts below went to the jugular in this case in determining, without unnecessary excursions into irrelevant issues, that petitioners' complaint and supporting submission did not in any respect present a triable issue concerning any restraint on competition. As the Court of Appeals put it, petitioners assert no Sherman Act claim "[s]ince on the record before us the Grizzlies have shown no actual or potential injury to competition resulting from the rejection of their application for an NFL franchise . . . ." A-30; 720 F.2d at 787.

In analyzing petitioners' claims, the Court of Appeals properly noted that an antitrust plaintiff must assert "adverse, anticompetitive effects within relevant product and geographic markets" (A-22; 720 F.2d at 783) and that "Sherman Act liability requires an injury to competition." A-26; 720 F.2d at 785. The court then fully considered petitioners' claims as to the two categories of commercial competition susceptible of restraint in a sports league context: (1) extra-League competition; and (2) intra-League competition.

As for extra-League competition, the Court of Appeals noted that "[n]o claim is made that abuse of NFL market power led to the demise of the World Football League . . . ." A-24; 720 F.2d at 784-85. The court also found that the NFL had acquired its assertedly dominant position in the marketplace under the express authority of a 1966 federal statute (A-23; 720 F.2d at 784) and that the NFL's decision not to enlarge the League's operations on petitioners' demand was "patently procompetitive" in a national market for competition between professional football leagues. A-27; 720 F.2d at 786.

As for possible restraints of intra-League competition, the Court of Appeals initially identified certain competitive issues *not* raised by petitioners: (1) there was no claim of violation "from the exclusion of potential competitors in the designated exclusive home territories" of NFL member clubs; (2) there was no complaint "that the NFL's 60-40 home team-visitor revenue-sharing arrangement" caused any injury to petitioners; and (3) there was no complaint "about the operation of the NFL arrangements for joint sale of television rights" made under a 1961 federal statute. A-9-10; 720 F.2d at 776.

The court then turned to petitioners' claim that "there nevertheless remains a not insignificant amount of intra-League non-athletic competition." A-28; 720 F.2d at 786. It noted, however, that petitioners made no claim of such competition with the NFL's St. Louis member club, located almost three hundred miles from Memphis, or with any other more distant NFL club. The courts below concluded, therefore, that the NFL's decision not to expand further on petitioners' demand imposed no restraint on any local or regional competition between petitioners and the NFL itself or any NFL member club. Indeed, as both courts recognized, petitioners remained free to join in the establishment of a league that would compete with the NFL and other entertainment producers.[2]

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[2] In fact, as the District Court noted, participants in petitioners' group are investors in the currently operating United States Football League. A-59; 550 F. Supp. at 570.

Petitioners' claim that the NFL constitutes an "essential facility," whose conduct should be governed by that limited antitrust principle (Pet. 23-25), was fully reviewed and emphatically rejected by the lower courts. The District Court correctly observed that the "essential facility" doctrine [3] requires a claimant to show that he is being denied "access to something necessary . . . to engage in business which is controlled by his *competitors.*" A-58; 550 F. Supp. at 569-70 (emphasis original). In affirming, the Court of Appeals properly concluded that the essential facility doctrine had no application here simply because petitioners "failed to show how competition in any arguably relevant market" was impaired by their inability to join in the NFL's operations. A-30; 720 F.2d at 787. In so concluding, moreover, the court expressly found no need to address the broader, fundamental question—which petitioners now urge upon this Court—of whether "there can never be competition among league members." A-28; 720 F.2d at 787 & n.9.

The absence of any identifiable restraint on commercial competition also supports the lower courts' conclusion that the "trade association" cases have no application here. Pet. 18, 25-26; Supp. Br. 4. Such cases hold that when independent horizontal competitors are permitted to engage in limited forms of joint activity of competitive advantage, they may not arbitrarily or unreasonably exclude other similarly situated businesses with whom they compete. At the time of their application for NFL membership, petitioners were not business competitors of any NFL member club—nor did they seek to join the League in order to compete in any economic or business sense. Rather, as petitioners' complaint and the undisputed record demonstrated, the Grizzlies sought to *share* in the benefits of the NFL's joint operations and to participate,

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[3] *See, e.g.*, Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); Hecht v. Pro-Football, Inc., 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978).

on an equal basis, in the League's revenue-sharing program. A-60, 29-30; 550 F. Supp. at 570-71; 720 F.2d at 787.[4]

Petitioners now seek to argue that the NFL's decision on their application presented triable issues of competition in a "market" for national broadcast revenues. Pet. 18-23. Petitioners did not, however, make any such contention in the District Court, and the complaint identified no such market. A-97-99. The Court of Appeals thus concluded that no such issue was presented. A-9-10; 720 F.2d at 776. In any event, as the courts below recognized, the NFL's joint, League-wide sale of television rights to the networks is accomplished under a

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[4] The leading scholarly commentary fully analyzes and rejects the argument that the trade association cases somehow require a sports league to apply "non-arbitrary criteria" in deciding who will be allowed to participate in the enterprise:

> "The gravamen of complaints directed against such organizations [as trade associations and licensing boards] is that their admissions practices limit the economic opportunities of potential competitors .... *The admission practices of sports leagues present a different concern. An analysis of the relationship between clubs within a league suggests that the various league members do not compete with one another in an economic sense .... Thus a decision on access to membership is basically a decision as to whether particular individuals (or their business entities) will be allowed to participate in the partnership venture.* Since the various members pool their efforts and do not engage in economic competition with one another, *an adverse decision on membership in the usual case has no appreciable impact on the level of competition which will take place ....*"
>
> "[Does] present legal doctrine require those who operate a joint business venture to have an obligation to apply non-arbitrary criteria in deciding who will be allowed to participate in the enterprise .... [T]he answer appears to be *no*. Once the concern for an adverse effect on competition is set aside, there is literally no case law which suggests that a group of investors is limited in its discretion to decide who will be given access to its mutual venture."

J. Weistart and C. Lowell, *The Law of Sports* 314-15 (1978) (footnotes omitted) (last emphasis in original; remaining emphasis supplied). *See also* R. Bork, *The Antitrust Paradox* 332 (1978).

1961 federal statute expressly exempting such sales from the antitrust laws. 15 U.S.C. §§ 1291-1295 (1976). A-85-87.[5] It is also undisputed that all NFL clubs equally share all League network television revenues and are not economic rivals in this sphere. Accordingly, no issues are presented here as to any restraint in a market for national broadcast revenues.

Little comment is necessary regarding petitioners' claim that the NFL's decision violated Section 2 of the Sherman Act, 15 U.S.C. § 2 (1976). In the absence of a restraint on competition, Section 2 imposes no restriction on the NFL's conduct.[6]

Petitioners failed to show that any business competition was restrained by the NFL's decision not to extend membership to the Grizzlies. To the contrary, as both lower courts noted, the NFL's decision was manifestly procompetitive in that it left open "the Memphis home team market . . . for potential competitors." A-31; 720 F.2d at 788. Petitioners did not seek to enter any market in order to compete, either with the NFL or any member team—rather, they sought to become joint participants in and to obtain all the rewards possible from full participation in the League's joint operations. Neither principle nor logic supports such a Section 2 claim.

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[5] Petitioners' assertion of a conflict with Board of Regents v. National Collegiate Athletic Ass'n, 707 F.2d 1147 (10th Cir.), *cert. granted*, 104 S. Ct. 272 (1983), is without merit. The college football organizations do not operate under the authority of the 1961 television statute (or any similar statutory provision), and the television marketing restrictions complained of in the NCAA case do not exist within the NFL.

[6] Even *assuming* that the NFL had monopoly power, the courts below properly recognized that it is the *abuse* of monopoly power, rather than its mere existence, that the Sherman Act proscribes. A-61-62, 30-31; 550 F. Supp. at 571-72; 720 F.2d at 788; *see also* United States v. Grinnell, 384 U.S. 563, 571 (1966); Official Airline Guides, Inc. v. FTC, 630 F.2d 920, 926-28 (2d Cir. 1980), *cert. denied*, 450 U.S. 917 (1981); Byars v. Bluff City News Co., 609 F.2d 843, 853 (6th Cir. 1979).

II. SUMMARY JUDGMENT IS PROPER IN ANTITRUST CASES, AND WAS PARTICULARLY APPROPRIATE ON THE UNDISPUTED RECORD OF THIS CASE

In concluding that petitioners' complaint should be dismissed on summary judgment, both the District Court and the Court of Appeals proceeded with unusual care and in clear recognition of the controlling summary judgment standards as stated by this Court. The District Court, for example, expressly invoked and applied the standards of *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962) (A-46; 550 F. Supp. at 564), and *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968). A-47; *id.*[7] The Court of Appeals further gave petitioners the benefit of every doubt, applying the requirements of Rule 56 (*see Cities Service, supra*, 391 U.S. at 288-90) notwithstanding petitioners' failure to file the required Rule 56(f) affidavit and on the assumption that petitioners' contention as to the inappropriateness of a summary disposition deserved consideration even in the absence of the required affidavit. A-16-17; 720 F.2d at 779-80.

The District Court's handling and evaluation of the summary judgment and discovery issues in this case clearly met the standards of *Cities Service, Poller,* and other controlling authorities.[8] In contrast, petitioners repeatedly failed to respect the requirements of Rule 56. While failing to file the required Rule 56(f) affidavit, petitioners contended below that the allegations in their complaint alone, without more, shifted to respondents

[7] The District Court noted its duty to "resolve all doubts as to the existence of genuine issues of fact against the moving party, and view all inferences from the facts in the light most favorable to the parties opposing the motion." A-46; 550 F. Supp. at 564.

[8] *See* Adickes v. S. H. Kress & Co., 398 U.S. 144, 158-61 (1970); and Norfolk Monument Co., Inc. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700, 702-03 (1969). *See also* the District Court's discussion of the authorities, including Harold Friedman, Inc. v. Kroeger, 581 F.2d 1068, 1071 (3d Cir. 1978); Lupia v. Stella D'Oro Biscuit Co., Inc., 586 F.2d 1163, 1167 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979); and Mutual Fund Investors, Inc. v. Putnam Management Co., 553 F.2d 620, 624 (9th Cir. 1977). A-45-48; 550 F. Supp. at 564.

the burden of proof and that the District Court was required to accept these allegations as true. Despite Rule 56(e)'s express requirement that a party opposing a motion "may not rest upon the mere allegations . . . of his pleading," petitioners persisted in this contention even after its error was drawn to their attention. A-138-39; *see also* A-134.

The Court of Appeals gave detailed scrutiny to petitioners' contention that they were denied adequate discovery. Pet. 11-13. Far from finding error, the Third Circuit's review highlighted a central deficiency of petitioners' case: the additional discovery sought could not have enabled the Grizzlies to demonstrate a material factual dispute on the issue of whether the NFL's decision had restrained actual or potential economic competition.[9] In reaching this conclusion, the Third Circuit reviewed in unusual depth *each* of petitioners' outstanding discovery requests. A-17-22 n.5; 720 F.2d at 780 n.5. Both courts below also expressly considered and rejected petitioners' contention that a triable issue of motivation was presented. A-56-57, 27; 550 F. Supp. at 569; 720 F.2d at 786.

At the close of its painstaking analysis, the Third Circuit concluded:

> "Considering the already large record compiled prior to its consideration of the summary judgment record, the absence of a Rule 56(f) affidavit, the irrelevance of most of the pending discovery requests, and the conjectural nature of the Grizzlies' contentions as to the possibility of establishment of actual or potential competition in any arguably relevant market, we conclude that the [district] court did not err in

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[9] For example, the Court of Appeals expressly found that:

"There is no indication that a professional football business located at Memphis, Tennessee would compete with any NFL member for . . . peripheral sources of revenue. The Grizzlies do not contend that the league members (or the Grizzlies themselves if they were admitted to the league) compete for rather than share in network television and ticket sale revenues." A-15; 720 F.2d at 779.

considering the motion for summary judgment on the present record." A-18-21; 720 F.2d at 781.

Accordingly, summary judgment in the circumstances of this case is entirely appropriate and the holding of the Third Circuit need not be further reviewed.

III. WHILE OTHER COURTS HAVE HAD UNUSUAL DIFFICULTY IN APPLYING THE SHERMAN ACT'S "CONSPIRACY" PROVISIONS TO BASIC PROFESSIONAL SPORTS LEAGUE ISSUES, THE THIRD CIRCUIT'S DECISION NEITHER PRESENTS SUCH AN ISSUE NOR CONFLICTS WITH THE NINTH CIRCUIT'S DECISION IN THE *LOS ANGELES COLISEUM* CASE

Contrary to petitioners' contention (Pet. 10; Supp. Br. 2-5), the intervening decision by the Court of Appeals for the Ninth Circuit in *Los Angeles Memorial Coliseum Commission* v. *National Football League*, 1984-1 Trade Cas. (CCH) ¶ 65,879 (9th Cir. 1984) (*"LA Coliseum"*), does not warrant review of the Third Circuit's decision by this Court. In the *LA Coliseum* case,[10] the NFL defendants and Oakland parties have filed petitions for reconsideration and rehearing en banc; a response to the petitions, ordered by the court, has been filed; and the case remains under consideration by the Ninth Circuit. Thus there remains a prospect that the decision of the majority of the Ninth Circuit panel will not be adopted.

More important, the issues as to which the Courts of Appeals are said to be in conflict (Supp. Br. 4-5) were not resolved by, and are not essential to, the decision of the Third Circuit below. Those issues, which were essential to the Ninth Circuit's decision in the *LA Coliseum* case, are: *first*, whether the internal NFL arrangements among the League's member clubs designating the home location of each club constitute a "contract, combination, or conspiracy" among independent horizontal competitors or whether, alternatively, they constitute lawful arrangements among participants in a joint venture or common enterprise; and *second*, whether, if such arrangements

[10] Set forth in the Appendix to petitioners' Supplemental Brief.

may—under some circumstances—constitute "conspiracies" under Section 1 of the Sherman Act, the reasonableness of such arrangements is to be determined under the standards developed for testing the reasonableness of agreements among horizontal competitors even though, as the Ninth Circuit put it, "the NFL teams are not true competitors, nor can they be." Supp. App. A-17; 1984-1 Trade Cas. at 67,678.[11]

As to the first issue, a majority of the Ninth Circuit panel rejected the NFL's contention that its member clubs were not independent competitors acting by "conspiracy" when they determined to continue the operations of an existing League team in the community designated in the League's Constitution. The majority held that such arrangements among the League's members as to the "home" location of each constituted an agreement among horizontal competitors that unlawfully restrained competition in both a local football market and a national stadium market in violation of Section 1 of the Sherman Act. The dissenting panel member concluded, in contrast, that the NFL is "a single entity for purposes of intra-league regulation of relocation of existing franchises" (Supp. App. A-56; 1984-1 Trade Cas. at 67,692), that "virtually every court to consider [the business relationship among NFL members] has concluded that NFL member clubs do *not* compete with each other in the economic sense," and that "[t]he majority's holding places the Ninth Circuit's ruling in conflict with every other circuit to consider this question." Supp. App. A-45-47; 1984-1 Trade Cas. at 67,688-689.

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[11] In a variety of contexts, the lower federal courts have reached conflicting conclusions as to the nature of the business relationship within a professional sports league. *See, e.g.*, North American Soccer League v. National Football League, 670 F.2d 1249, 1251 (2d Cir.), *cert. denied*, 103 S.Ct. 499 (1982) (NFL a "joint venture"); Smith v. Pro Football, Inc., 593 F.2d 1173, 1179 (D.C. Cir. 1978) ("NFL clubs . . . are not competitors in any economic sense"); Mackey v. National Football League, 543 F.2d 606, 619 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977) (NFL has "some characteristics of a joint venture"). *See also* San Francisco Seals, Ltd. v. National Hockey League, 379 F. Supp. 966, 970 (C.D. Cal. 1974) (hockey league a "single unit"); Levin v. National Basketball Ass'n, 385 F. Supp. 149, 150 (S.D.N.Y. 1974) (basketball league "a joint venture"; teams are "dependent upon one another as partners").

With respect to the second issue, the Ninth Circuit majority held that the reasonableness of internal sports league arrangements was to be evaluated by the same standards applied to agreements among independent horizontal competitors, including requirements of objectivity, procedural regularity, and "less restrictive" alternatives.[12] Such an approach, which rejects the joint venture and ancillary restraint aspects of sports league operations, is sharply at odds with Justice Rehnquist's observations in his dissent from the denial of certiorari in *National Football League* v. *North American Soccer League,* 103 S. Ct. 499 (1982).[13]

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[12] Such considerations may be relevant only to the degree that they relate to the impact of a challenged agreement on competition. *See* Continental TV, Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58 n.29 (1977). The Ninth Circuit, however, made no finding that the supposed procedural infirmities of the NFL's arrangements on the location of its teams had any effect whatsoever on competition in any relevant market.

[13] Commenting on the application of ancillary restraint concepts to the NFL's internal ownership policies involved in that case, Justice Rehnquist noted:

> "The [NFL] cross-ownership rule, then, is a covenant by joint venturers who produce a single product not to compete with one another. The rule governing such agreements was set out over 80 years ago by Judge (later Chief Justice) Taft: A covenant not to compete is valid if 'it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of its fruits by the other party.' United States v. Addyston Pipe & Steel Co., 85 F. 281, 282 (C.C.A. 6, 1898), *aff'd as modified,* 175 U.S. 211, 20 S. Ct. 96, 44 L. Ed. 136 (1899) . . . . "
>
> "The Court of Appeals also faulted the NFL for failing to show that its restriction was as narrow as possible. Although the Court of Appeals did not cite any authority for this objection, it seems to be relying on the requirement of *Addyston, supra,* that the restraint be 'necessary to protect the covenantee.' 85 F., at 282. The Court of Appeals has taken this statement too far by adopting the least restrictive alternative analysis that is sometimes used in constitutional law. The antitrust laws impose a standard of reasonableness, not a standard of absolute necessity." *Id.* at 501-02.

See also S. Robinson, Recent Antitrust Developments—1979, 80 Col. L. Rev. 1, 15-22 (1980).

Here, however, the Third Circuit, in rejecting petitioners' claims, did not reach either of these issues. The Third Circuit explicitly stated that its decision did not depend upon acceptance of the League's position as to the lack of competition between the members in the resolution of intra-League matters. A-28; 720 F.2d at 786-87. The court *assumed* that the member clubs may be competitors in some respects, but rejected petitioners' claims because petitioners failed to show the requisite competition in any relevant product or geographic market between NFL members and a potential League team in Memphis. The Third Circuit's decision thus rests not upon the League's position as to the inherently joint character of League ventures and the absence of intra-League competition—the central issue in the Ninth Circuit case—but upon petitioners' failure to identify any phase of actual or potential competition between a team in Memphis and any League member that had been restrained to petitioners' injury. In addition, having found no restraint, the Third Circuit did not consider the standards to be used in assessing the reasonableness of any restraint.

The dissenting member of the Ninth Circuit panel in *LA Coliseum,* who accepted the League's position as to the joint or unitary nature of the sports league relationship, did cite with approval passages from the District Court's opinion in this case. Supp. App. A-46, 50, 53; 1984-1 Trade Cas. at 67,688, 67,690-92. Those passages and other statements by both of the courts in this case do suggest acceptance of the NFL's position that in the resolution of intra-League matters the member clubs are not horizontal business competitors but common venturers engaged in the joint production of a single League product.[14] Accordingly, it may be that the Third Circuit, faced with the issue presented to the Ninth Circuit in the *LA Coliseum* case, would concur with the dissenting member of the Ninth Circuit panel and rule in the League's favor.

[14] The Third Circuit stated, for example, that "[f]or the most part the congressionally authorized arrangements under which the NFL functions eliminate competition among the league members. Indeed it is undisputed that on average more than 70 percent of each member club's revenue is shared revenue derived from sources other than operations at its home location." A-28; 720 F.2d at 786.

Should the Ninth Circuit adopt or let stand the application of Section 1 of the Sherman Act to NFL operations that has been announced by a majority of a panel of that court, it would then be most appropriate for this Court to issue a writ and clarify the application of the Sherman Act to internal arrangements among members of sports leagues.[15] However, the instant case—involving only the question of whether the Sherman Act assures favorable action on an applicant's request to enlarge a league—presents no comparable issues that warrant review by this Court.

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[15] Although this Court has on several occasions considered *whether* professional sports leagues are *exempt* from the antitrust laws, *see* Flood v. Kuhn, 407 U.S. 258 (1972); Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953), it has never considered *how* the antitrust laws should *apply* to the admittedly unique business relationship within such leagues. From enactment of the Sherman Act until the late 1950's, it was largely accepted that the antitrust laws did not extend to professional league sports, *see* Radovich v. National Football League, 352 U.S. 445 (1957), and little antitrust law developed in those decades with respect to sports league issues. As a result, the lower courts—recently inundated with such issues—have often been at sea and felt compelled to look to horizontal competitor relationships for precedential guidance, with the result that their decisions often do not reflect any coherent antitrust doctrine or the business realities of sports leagues.

CONCLUSION

This Court has consistently emphasized that the antitrust laws deal exclusively with restraints on commercial competition in the marketplace; they do not purport to afford remedies for all losses or wrongs that parties may assert have occurred in interstate commerce. *Hunt* v. *Crumboch*, 325 U.S. 821, 826 (1949). Both courts below applied this settled principle to the allegations of petitioners' complaint. Both concluded without dissent that no triable issue concerning any restraint of competition was presented—and that petitioners did not in any manner "set forth specific facts showing that there [was] a genuine issue for trial." Rule 56(e), F.R. Civ. P.

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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